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AND

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1931.

Feb. 12. *This day the* RIGHT HON. SIR DINSHAH FARDUNJI MULLA, C.I.E., *having been appointed a Member of His Majesty's Most Honourable Privy Council was, by His Majesty's command, sworn, and took his place at the Board accordingly.*

Apr. 26. THE RIGHT HON. SIR EDWARD CLARKE, K.C., *sometime Solicitor-General, died this day at his residence, Peterhouse, Staines, aged* 90.

May 1. SIR JAMES BENJAMIN MELVILLE, K.C., M.P., *lately Solicitor-General, died this day at* 9 *Royal Avenue, Chelsea, aged* 46.

June 29. *This day* SIR WILLIAM ALLEN JOWITT *was, by His Majesty's command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

Sept. 18. SIR THOMAS WALKER HOBART INSKIP, C.B.E., K.C., *was appointed to be His Majesty's Solicitor-General in the place of the Hon. Sir R. Stafford Cripps, K.C., resigned.*

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE
PRIVY COUNCIL.

[HOUSE OF LORDS.]

SWADLING . . . . APPELLANT;

AND

COOPER . . . . RESPONDENT.

H. L. (E.)*
1930
July 28.

Negligence—Contributory Negligence—Road Collision—Direction to Jury.

In a summing up in a collision action it is not the whole law of negligence which requires exposition in every case but only that part of it which is essential to a clear understanding of the issue which the jury has to determine. The direction to the jury should be adapted to the special circumstances of the case.

The appellant, whilst driving a motor car at about thirty miles an hour along a main road, approached a point in the road where it was crossed by a side road, when a man riding a motor cycle came into the road from the side road without warning and a collision occurred at the cross roads between the car and the cycle, and the cyclist was killed. The appellant applied his brakes but failed to avoid the collision. The utmost limit of time between the moment when the appellant could have seen the deceased man and the moment of impact was not more than a second. In an action brought by the respondent, the widow of the deceased man, against the appellant under Lord Campbell's Act for damages for the loss of her husband, the judge directed the jury that if they found that the defendant was negligent in such a way as to cause the accident, but that the deceased man was guilty of contributory negligence so that both parties were substantially to blame for the accident, they should find a verdict for the defendant, and that the question was, whose negligence was it that substantially caused the accident? The jury found for the defendant and judgment was entered accordingly. The Court of Appeal ordered a new trial on the ground of misdirection, in that the judge omitted to direct the jury that if, though both were negligent, the defendant could by reasonable care, after the negligence of the deceased man, have avoided his negligence, they should find for the plaintiff:—

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* *Present:* VISCOUNT HAILSHAM, VISCOUNT DUNEDIN, LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, and LORD THANKERTON.

Held that, it being clear from the facts that from the moment when the parties became aware of their respective positions there could have been no time for the defendant to do anything to avoid the impact, the judge had sufficiently explained to the jury the law applicable to the facts.

Decision of the Court of Appeal [1930] 1 K. B. 403 reversed.

APPEAL from an order of the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) (1) setting aside a verdict and judgment in favour of the appellant (the defendant) in an action tried before Humphreys J. and a special jury at Cambridge and ordering a new trial on the ground that the judge had failed to give the jury any sufficient direction as to the meaning of contributory negligence.

The facts and the direction of the judge are stated in the judgment of Viscount Hailsham and are summarized in the headnote.

1930. May 26, 27, 29, 30. *Croom-Johnson K.C.* and *Flowers K.C.* (with them *Montague Berryman* and *D'Arcy Edmondson*) for the appellant. Two questions arise on this appeal: (1.) What is the right direction to a jury where contributory negligence is pleaded in a motor car collision case? (2.) Is any distinction to be drawn where the contributory negligence alleged is a continuous one and where it is simultaneous with that of the defendant? The law on this subject is in a lamentable state of confusion. The question what is the proper direction in a road case has not been before this House since 1876. Judges in this and other cases have appealed for the laying down of a simple guide. *Butterfield* v. *Forrester* (2) lays down the doctrine of contributory negligence.

(1) [1930] 1 K. B. 403.

(2) (1809) 11 East, 60.

Davies v. *Mann* (1) adds the refinement that the plaintiff shall not succeed if by the exercise of ordinary care he could have avoided the consequences of the defendant's negligence. Why is it logical to stop there ? Where both parties have been negligent you arrive at the absurd result of conflicting directions on claim and counterclaim and the result might turn on which party gets in his writ first. In such cases as *Davies* v. *Mann* (1) and *Radley* v. *London and North Western Ry. Co.* (2) the contributory negligence had occurred long before the accident. In the appellant's submission the proper direction in such cases is quite different from that in a case like the present. In *Tuff* v. *Warman* (3) it is laid down by the Exchequer Chamber that the proper question for the jury in cases of this kind is " whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened." That is in effect what the trial judge told the jury here.

[VISCOUNT DUNEDIN. In *Doyle* v. *Kinahan* (4) it was held that a plea of contributory negligence implied that the defendant could not have avoided the accident by the exercise of reasonable care.]

Regard should be had to the opportunity possessed by either party to an accident of avoiding the consequences of the other's negligence. Common law must move with the times, and rules devised for determining negligence in accidents between slow moving vehicles or sailing-craft are inapplicable to fast moving cars where negligence on the two sides may be almost synchronous and the accident follows immediately.

Service v. *Sundell* (5) and *Hargrove* v. *Burn* (6) illustrate the difficulty of adapting the present rules to modern conditions. The proper direction in such cases should be "If the parties were negligent, whose negligence substantially caused the accident?" On the facts of this case there was no room for any further direction.

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(1) (1842) 10 M. & W. 546.

(2) (1874-6) L. R. 9 Ex. 71, 74; L. R. 10 Ex. 100, 104; 1 App. Cas. 754, 758-60.

(3) (1857-8) 2 C. B. (N. S.) 740, 755-6; 5 C. B. (N. S.) 573, 585.

(4) (1869) 17 W. R. 679.

(5) (1929) 45 Times L. R. 569; 46 Times L. R. 12.

(6) (1929) 46 Times L. R. 59.

[They also referred to *Bridge* v. *Grand Junction Ry. Co.* (1); *Dimes* v. *Petley* (2); *Dowell* v. *General Steam Navigation Co.* (3); *The Bywell Castle* (4); *The Bernina* (5); *Reynolds* v. *Thomas Tilling, Ld.* (6); *British Columbia Electric Ry. Co.* v. *Loach* (7); *Admiralty Commissioners* v. *Owners of S.S. Volute* (8); *Neenan* v. *Hosford.* (9)

VISCOUNT DUNEDIN referred to *Gibb* v. *Edinburgh and District Tramways Co.* (10)]

Charles Doughty K.C. and *Aiken Watson* for the respondent. As stated by Lord Penzance in *Radley* v. *London and North Western Ry. Co.* (11), the law in these cases of contributory negligence is settled beyond dispute. The first proposition is that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first—namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. If your Lordships are of opinion that there is no room in this case for the proviso stated by Lord Penzance no fault can be found with the summing up; but, if it is a possible view that the appellant had an opportunity of avoiding the accident and did not take it, that ought to have been put by the judge to the jury. It was contended at the trial on behalf of the respondent that the appellant might have avoided the accident by swerving into the centre of the road when he first caught sight of the deceased man, but this point was ignored by the judge in his summing up, which contained no reference to the conduct of the appellant after the emergency arose. Although the jury asked for further explanation as to the meaning of contributory negligence the judge deliberately refrained from putting the proviso to the jury as being unnecessary, and in the respondent's submission he failed to give the jury any sufficient direction.

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(1) (1838) 3 M. & W. 244, 248.
(2) (1850) 15 Q. B. 276.
(3) (1855) 5 E. & B. 195, 206.
(4) (1879) 4 P. D. 219, 223.
(5) (1887) 12 P. D. 36, 58, 61.
(6) (1903) 19 Times L. R. 539; 20 Times L. R. 57.
(7) [1916] 1 A. C. 719.
(8) [1922] 1 A. C. 129, 136, 144.
(9) [1920] 2 I. R. 258.
(10) 1913 S. C. 541, 547.
(11) 1 App. Cas. 754, 759.

Flowers K.C. replied.

The House took time for consideration.

1930. July 28. VISCOUNT HAILSHAM. My Lords, this is an appeal by the defendant from an order of the Court of Appeal setting aside a verdict and judgment for the defendant and ordering a new trial in a case which was tried before Humphreys J. and a jury at Cambridge Assizes. The action was brought by the respondent as the administratrix of William Cooper deceased to recover damages under the provisions of Lord Campbell's Act for loss occasioned to her and to her infant daughter by the death of William Cooper which was alleged to be due to the negligence of the appellant while driving a motor car along the road from Newmarket to London on July 18, 1928.

The negligence alleged in the statement of claim was: driving at an excessive speed, failure to give proper warning, failure to slow down on approaching a cross road, failure to keep his motor car under proper control or to apply his brakes so as to slow up or stop and so avoid colliding with the deceased.

The appellant by his defence denied that he was guilty of any negligence and alternatively alleged that the deceased contributed to the accident by his own negligence.

At the trial evidence was given that the Newmarket–London road is crossed at right angles by a road leading from Saffron Walden to Cambridge. The Newmarket–London road is between 18 and 19 feet wide and there is a grass verge on each side. On the evening of the accident the defendant was proceeding in his motor car from Newmarket towards London, and was driving his motor car about 3 feet from his near side of the road at a speed of between 30 and 35 miles per hour. The deceased was proceeding westwards from Saffron Walden to Cambridge on a motor cycle; and the car and the cycle came into collision at the cross roads at a spot about 4 feet into the Newmarket–London road and opposite the south side of the Saffron Walden–Cambridge road. The appellant gave due warning of his approach to the cross roads; no witness on either side heard any warning from the deceased. The distance from the position of the appellant's car when he first became aware of the presence of the deceased to the spot of the collision was not more than 11 yards. After the accident the motor cycle fell on the east side of the Newmarket–London road, about 20 yards south of the collision, the motor car came to a stop on the west side of the road about 30 yards from the spot of the collision.

The learned judge began his summing up on the law in these terms: "If you find that the injuries from which this man undoubtedly suffered were not caused by the negligence on the part of the defendant, then there is an end of the case, because you must find a verdict for the defendant, because the plaintiff has to satisfy you that the plaintiff is entitled to damages—the onus is on the plaintiff. Then there is another possibility. Supposing you find that the defendant was negligent, and that it was to some extent his negligence which caused the injuries from which the deceased man died, if you should also come to the conclusion that it was substantially also owing to the negligence of the deceased man himself that that accident occurred, so that both parties were—I will not say equally, but substantially to blame for the accident, then, again you must find a verdict for the defendant, because the law is that even if you are injured by somebody else's negligence, yet, if you substantially contribute to those injuries by your own negligence, you cannot recover damages from the other person. Now, that is the issue you have to try. You have got to consider, first of all: Are you satisfied

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that the defendant was negligent, negligent in such a way as to cause this collision which caused the injuries ? If so, are you of opinion that the deceased man, who would under ordinary circumstances have been plaintiff himself, was guilty of contributory negligence ? "

The learned judge then proceeded to review the evidence in language to which no exception was taken on either side, and he concluded his summing up on this part of the case with these words : " That is the evidence, and it is upon that evidence, as it seems to me, that you will have to make up your minds upon the two things which I have told you are really the material questions in this case : Was the accident caused by the negligence of the defendant ? If so, was the accident contributed to by the negligence of the deceased man ? "

After a considerable interval the jury returned into Court and by their foreman asked the judge whether he could give them any help as to what he meant by substantial contributory negligence. In reply to that request the learned judge said : " Assuming that you found that the defendant was negligent and that he was so negligent that you could say that the accident was caused by his negligence ; but if you also come to the conclusion that the plaintiff was so negligent that you can say that the accident was really caused by the negligence of both of them, then that is negligence which contributed to the accident. I do not think I can really help you more than that, because I may tell you this : If the defendant was negligent and the plaintiff was negligent, but the plaintiff's negligence was only to this extent, that he did not do the absolutely right thing at the moment, that would not be contributory negligence. It really comes to this : If you find that the accident was due to the negligence of both parties substantially, then that would be contributory negligence on the part of the plaintiff. I do not know that I can help you further than that ; it is a question which a jury have to decide. There is no real definition of ' contributory negligence ' ; it is a question which a jury have to decide, and I think you will agree it really comes to a matter of common sense. It may be you think that the plaintiff did not do everything that was absolutely right; that would not be sufficient to disentitle him to damages. But if you say that although the defendant was negligent, so was the other man, so that they were both to blame, then you could not find for the plaintiff, you would have to find for the defendant."

In response to an invitation from the learned judge, junior counsel for the plaintiff asked: "Does not the element enter into it, who was guilty of the last act of negligence?" to which the learned judge replied: "Not necessarily. Whose negligence was it that substantially caused the injury?"

The jury again retired and after a few minutes returned with a verdict for the defendant and the learned judge entered judgment accordingly.

The Court of Appeal have ordered a new trial on the ground that the learned judge ought to have directed the jury in plain terms: "If you think the plaintiff was negligent but that the defendant, after the plaintiff was negligent, by taking reasonable care could have avoided him, such negligence of the plaintiff is not, as a matter of law, negligence which contributes to the accident so as to prevent the plaintiff from recovering."

The Court of Appeal held that the omission to give such a direction may have misled the jury and therefore that the verdict cannot stand. It is from this decision that the present appeal is brought.

My Lords, the law in these collision cases has long been settled. In order to succeed the plaintiff must establish that the defendant was negligent and that that negligence caused the collision of which he complains. If it is established from his own evidence, or by evidence adduced on behalf of the defendant, that the plaintiff could have avoided the collision by the exercise of reasonable care, then the plaintiff fails, because his injury is due to his own negligence in failing to take reasonable care. If, although the plaintiff was negligent, the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to take that reasonable care to which the resulting damage is due and the plaintiff is entitled to recover.

Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence: the plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances. All this is familiar law and is commonly illustrated in text-books by contrasting the cases of *Butterfield* v. *Forrester* (1) and *Davies* v. *Mann.* (2)

In *Butterfield* v. *Forrester* (1) the defendant had erected an obstruction in the highway and the plaintiff rode against it and was hurt, and Bayley J. directed the jury that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard and without ordinary care, they should find a verdict for the defendant, and this direction was upheld.

In *Davies* v. *Mann* (2) the plaintiff negligently turned a donkey into the highway, hobbled, and the defendant's wagon ran over it and killed it. Erskine J. directed the jury that if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver the action was maintainable; and that if they thought the accident might have been avoided by the exercise of ordinary care on the part of the driver they should find for the plaintiff. The Court of Exchequer upheld this direction.

Parke B. quotes and affirms his own previous statement of the law in *Bridge* v. *Grand Junction Ry. Co.* (3) in these terms: "The rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester* (1): and that rule is, that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he

(1) 11 East, 60.
(2) 10 M. & W. 546.
(3) 3 M. & W. 244, 248.

might have avoided them, he is the author of his own wrong."

In both these cases there was a substantial interval of time between the initial negligence of the defendant or of the plaintiff respectively and the negligence which was the proximate cause of the injury; and the crucial question, upon which liability depended, was whether either party could by the exercise of reasonable care have avoided the consequences of the other's negligence; if he could, then that party is legally responsible for the accident. But there are other cases in which the negligence of the parties is contemporaneous or so nearly contemporaneous as to make it impossible to say that either could have avoided the consequences of the other's negligence, and in which both have contributed to the accident. (A discussion of this class of case is to be found in *Admiralty Commissioners* v. *Owners of S.S. Volute.* (1))

These plain principles have been discussed and elaborated in a long series of cases, but I do not think that those discussions have in any way qualified or lessened the authority of the earlier decisions. It is manifest that a full discussion of these cases and of the judgments delivered in them would be wholly inappropriate in a summing up and would inevitably tend to confuse and bewilder the jury. In a summing up it is essential that the law should be correctly and fully stated; but it is hardly of less importance that it should be stated in simple and plain terms so that a jury unskilled in the niceties of legal phraseology may appreciate the direction which is being given to them. Such direction should be adapted to the special circumstances of the case. It is not the whole law of negligence that needs exposition in every case, but only that part of it which is essential to a clear understanding of the issue which the jury has to determine. The question here is whether having regard to the facts of this case the law was sufficiently stated to the jury. Mr. Doughty in a very able and candid argument admitted that the utmost limit of time between the moment when the defendant could have become

(1) [1922] 1 A. C. 129.

aware of the deceased's approach and the moment of the impact was not more than one second. It is common ground that the defendant applied his brakes at once; the only suggestion made against him is that he ought also to have swerved into the middle of the road, a suggestion which we are told was argued before the jury although it does not appear to have been pleaded in the statement of claim.

On these facts was there any room for the application of the doctrine which was illustrated in *Davies* v. *Mann* (1)? The crucial question was that stated by the learned judge in his concluding sentence: "Whose negligence was it that substantially caused the injury?" That question the jury answered in favour of the defendant. The jury may well have thought that the defendant was negligent in approaching the junction of the roads at too rapid a pace: they must also have thought that the deceased was negligent in the way in which he came out into the road, either by reason of the pace at which he proceeded or by reason of his position in the road. On this view of the facts it seems clear that from the moment when the parties became aware of their respective positions there can have been no time for the defendant to do anything to avoid the impact and therefore that the negligence of each party contributed to the collision. In these circumstances it appears to me that the learned judge did sufficiently explain to the jury what on the facts of this case were the considerations to which they had to apply their minds and what was the law applicable to the facts. It follows that the appeal must be allowed and the judgment of the trial judge restored, and that the appellant must have the costs of the proceedings here and below and I move your Lordships accordingly.

I am authorized by my noble and learned colleagues who have heard the argument to say that they concur in this opinion.

Order of the Court of Appeal reversed and judgmn of Humphreys J. restored. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House.

(1) 10 M. & W. 546.

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Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 28, 1930.

Solicitors for the appellant: *Berrymans.*

Solicitors for the respondent: *Wm. Easton & Sons.*

Distinguished. In re GIRLS' PUBLIC DAY SCHOOL TRUST [1951] 1 Ch. 400

[HOUSE OF LORDS.]

H. L. (E.)*
1930
July 29.

GIRLS' PUBLIC DAY SCHOOL TRUST, LIMITED . . . . APPELLANTS;

AND

EREAUT . . . . RESPONDENT.

Revenue—Income Tax—School carried on by Company—Members of Company entitled to fixed Dividend—Claim to Allowance as Public School in respect of Buildings—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schedule A, No. VI., r.* 1 (*c*).

A day school for girls was owned by a limited company the constitution of which allowed the payment of a limited dividend to its preference shareholders. The company was formed for the purpose of establishing in England public day schools for the education on moderate terms of girls of all classes above the elementary school age and was managed by a council consisting of persons elected on account of their qualifications to administer education, and having as their sole object the maintenance of the company's schools at the highest level of efficiency. The school was subject to the control of the Board of Education and was in receipt of Government grants, upon which it was largely dependent for its maintenance. It was a condition of receiving these grants that the school should not be conducted for private profit, and this school was treated by the Board as complying with that condition. The company could not refuse to admit a pupil except upon grounds considered reasonable by the Board and was bound to accept a certain percentage of free pupils, including scholars to whom scholarships were awarded by the Local Education Authority, who recognized this school as providing a public school education. The Board of Education had an option in 1956 of requiring that the assets of the company should become subject to a binding charitable trust for educational purposes. Upon a claim by the company for exemption from income tax in respect of the buildings of the school as being a public school within the meaning of r. 1 (*c*) of No. VI. of Schedule A of the Income Tax Act, 1918, the General Commissioners held that the school was a public school and allowed the claim:—

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* *Present:* VISCOUNT HAILSHAM, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD MACMILLAN.

Held, that the term "public school," as used in this rule, was not a term of art, and that the question what was the common understanding of the term was a question of fact for the Commissioners; and that, there being ample evidence to support their conclusion, it could not be reviewed.

Blake v. *Mayor, &c., of City of London* (1886–7) 18 Q. B. D. 437; 19 Q. B. D. 79 discussed.

Decision of the Court of Appeal [1929] 2 K. B. 274 reversed.

Appeal from an order of the Court of Appeal (Lord Hanworth M.R., Lawrence and Slesser L.JJ.) affirming an order of Rowlatt J. (1) upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of West Brixton. The case is set out in full in the report before Rowlatt J. and the Court of Appeal.

The appeal arose upon a claim made by the appellant company to be exempt from income tax chargeable under Schedule A in respect of the annual value of the premises of the Wimbledon High School for Girls for the seven years ending April 5, 1927, as being a public school within the meaning of r. 1 (*c*) of No. VI. of Schedule A of the Income Tax Act, 1918.

The Commissioners allowed the claim, but their determination was reversed by Rowlatt J., whose decision was affirmed by the Court of Appeal.

1930. June 19, 20. *Sir John Simon K.C.* (with him *Latter K.C.*, *Edwardes Jones K.C.* and *Gurney Beagley*) for the appellants. The question raised by the appeal is whether the Commissioners were justified in holding that the Wimbledon High School for Girls was a public school within the meaning of r. 1 (*c*) of No. VI. of Schedule A of the Income Tax Act, 1918, so as to entitle the appellants to an allowance of the amount of tax charged in respect of the school buildings. Unless the Court of Appeal are right in holding as matter of law that no school can properly be termed a public school within the rule where a distribution of the profits of carrying it on is made among the proprietors there was ample evidence

(1) [1929] 2 K. B. 274.

to support the conclusion of the Commissioners—and indeed this was admitted by Lawrence L.J. The appellants are a limited company having for its primary object the establishment and maintenance in London and the provinces of public day schools for the education on moderate terms of girls of all classes above those provided for by the Elementary Education Acts and the dominating motive of the proprietors was not the making of profit but the provision of educational facilities for members of the public. This school has all the indicia of a public school. It is subject to a large amount of control by the Board of Education and is in receipt of Government grants which during the relevant years were not made to a private school. The conditions of the receipt of Government grants, as laid down in the Secondary Schools Regulations, required that the school should not be conducted for private profit and the Board of Education has held that this school complies with that condition. The school is managed by a Governing Body consisting of twenty-four persons one-third of whom are nominated by the Local Education Authority and the remainder are appointed by the Council of the Trust, consisting, as the Commissioners have found, of persons elected on account of their qualifications to administer education and having for their sole object the maintenance of the schools of the Trust at the highest level of efficiency. The Local Education Authority have recognized that this school provides what is commonly described as a public school education and the standard of education is found by the Commissioners to be in all respects as high as that of Brighton College, which has been held entitled to the allowance as a public school: see *Brighton College* v. *Marriott*. (1) So long as the appellants are in receipt of Parliamentary grants from the Board of Education they cannot refuse to accept a pupil except on grounds which the Board consider to be reasonable and they are bound to receive a certain number of free pupils, and among such pupils are scholars to whom scholarships are awarded by the Local Education Authority. The decision of the Court of Appeal was founded upon certain observations of Fry L.J. in *Blake* v. *Mayor, &c., of the City of London.* (1) In that case the Commissioners had decided that the City of London School was a public school within the meaning of the corresponding provision of the Income Tax Act, 1842, notwithstanding that it was partly maintained by fees charged for instruction, and their decision was upheld, first, by the Divisional Court and, afterwards, by the Court of Appeal. In the Divisional Court Denman J. said that the words "public school" in that Act were not words of art and that what was the common understanding of those words was a question not of law but of fact, and there is no suggestion that the Court of Appeal in affirming that decision proceeded on any different grounds. All the members of the Court refrained from attempting to give an exhaustive definition of the term "public school." Lord Esher M.R. relied on the fact that the object of the school was the education of a sufficiently large number of persons to enable the Court to say that it was a public object. In determining the meaning of the term "public charity" Manisty J. in *Hall* v. *Derby Sanitary Authority* (2) said that the main question was not the source from which the income was derived, but the purpose of the institution, and he held that there might be a public charity, the purposes of which were confined to a special class of the public, if the charity had an extensive objective. Buckley L.J. in *Shaw* v. *Halifax Corporation* (3), approving Manisty J.'s opinion, said that the salient point to be considered was whether the class to be benefited extended to a substantial body of the public. So here the material point is to see whether the schooling provided is with a view to making education available to the public or only to a select few. In *Blake's* case (4) Fry L.J. said that the school had certain characteristics which denoted a public school, and among these he mentioned that no private person had any interest in the school and that no profit was in contemplation of the managers, but he did not mean to lay down that the absence of those characteristics, though an important factor to be considered, necessarily prevented a school from being a public school. Rightly considered *Blake's* case does not conclude the question against the appellants. In *Dilworth* v. *Commissioner of Stamps* (1) Lord Watson, discussing the meaning of the term "public school," said that "schools conducted by individuals for their own emolument" were clearly private. That is manifestly right, but his Lordship was not dealing with a case like the present, and that case is not authority against the appellants. In *Cardinal Vaughan Memorial School Trustees* v. *Ryall* (2) Rowlatt J., reversing the decision of the Commissioners, held that a Roman Catholic Secondary School was a public school, since it provided for a special class of the public. No doubt, the meaning to be given to an expression in a section of an Act of Parliament is a question of law, but it does not follow that the legal meaning of the expression may not be one which can only be applied in a given case by considering all the facts. So considered "public school," as Denman J. has said, is not a phrase of art, but is upon its proper construction in this section to be interpreted by the common understanding of those words, and Lawrence L.J. was wrong in laying down that no institution could be a public school if there was any element, either subsidiary or hypothetical, of pecuniary benefit to persons associated with or carrying on the institution. An analogy may be found in the cases of what amounts to "residence" within the meaning of r. 2 (*d*) of the General Rules applicable to Schedule C, where this House has held that the question whether a claimant for exemption was or was not resident in the United Kingdom was a question of fact for the Commissioners: see *Levene* v. *Inland Revenue Commissioners* (3) and *Inland Revenue Commissioners* v. *Lysaght*. (4) It is more important to consider the nature of the school and the character of the services rendered than to see how the school is financed. The object of the founders was not to make a profitable investment but to provide education to the public. There is no authority or justification for the proposition that a limited company cannot own a public school or for the proposition that a school otherwise having the characteristics of a public school cannot in law be a public school if the capital by which it has been provided has been raised as share capital remunerated by a limited dividend rather than by borrowing at interest. The Commissioners, having considered the character of the education provided by this school, the facilities which it affords to the public, the control which the public has over it, and its financial organization, have determined that this school is a public school, and there being evidence to support that conclusion it cannot be reviewed.

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(1) [1926] A. C. 192.

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(1) 18 Q. B. D. 437; 19 Q. B. D. 79.

(2) (1885) 16 Q. B. D. 163, 171.

(3) [1915] 2 K. B. 170, 180, 181.

(4) 19 Q. B. D. 79, 82.

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(1) [1899] A. C. 99, 108.
(2) (1920) 7 Tax Cas. 611.
(3) [1928] A. C. 217.
(4) [1928] A. C. 234.

Raymond Needham K.C. and *Reginald Hills* for the respondent. It is not suggested that *Blake's* case (1) establishes that it is an essential requisite of a public school that all private gain should be excluded; an accidental financial advantage would not prevent a school from being a public school. But where a school is privately owned and a substantial part of the profit goes to the private owners it is impossible to say that it is a public school for the purposes of the exemption. Another requisite of a public school mentioned by Fry L.J.—namely, that it should have a permanent foundation (see *Birkenhead School, Ld.* v. *Dring* (2)), is wanting in the present case. This school is one of the assets of the company subject to no present charitable trust. The company still retains its power of conducting its own business and can discontinue the school at any time it thinks fit; and if default is made for two years in the payment of dividends to the preference shareholders they can require a winding up and can put an end to the school. Further, it has always been accepted in all the Courts that no institution comes within the definition of a public school unless it is publicly and not privately owned, that is to say, owned either by a public corporation or by trustees subject to a public trust: see *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (3); *Cardinal*

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(1) 19 Q. B. D. 79.
(2) (1926) 11 Tax Cas. 273.
(3) [1891] A. C. 531, 583–588.

Vaughan Memorial School Trustees v. *Ryall.* (1) No dividend paying school has ever been granted this exemption. Tax cannot be claimed back unless it is paid for the purposes of the institution and not to enhance the dividends of private owners. The question what is a public school within this rule is a question of law. It is said that the criterion is to be found in the popular meaning of the term. But the popular meaning is at once too wide and too narrow. In its ordinary sense a public school means a school for the education of boys between the ages of thirteen and eighteen of a certain social standing, and it matters not that the school may be privately owned. An elementary school would not be included in this definition. As used in this section, the term "public school" is a legal phrase for which a legal meaning must be sought. This school is founded by an ordinary limited company trading for private profit, and it is really controlled by the representatives of the company. Acceptance of the Government grant and submission to a certain standard of efficiency cannot convert a private school into a public school. The idea that the exemption applies to a school in private beneficial ownership is negatived by the whole of the expressions in the exemption clause.

[They also referred to *Bain* v. *Free Church of Scotland* (2); *Ackworth School* v. *Betts* (3); *Scottish Woollen Technical College, Galashiels* v. *Inland Revenue Commissioners* (4); *Needham* v. *Bowers.* (5)]

Sir John Simon K.C. replied.

The House took time for consideration.

1930. July 29. VISCOUNT HAILSHAM. My Lords, in this case the appellants claim to be exempt from income tax chargeable under Schedule A in respect of the annual value of the premises of the Wimbledon High School for Girls by virtue of the provisions of r. 1 (*c*) of No. VI. of Schedule A, which grants an allowance under that schedule of "the amount of the tax charged on any hospital, public school or almshouse, in respect of the public buildings, offices and premises belonging thereto," with certain exceptions not material to this case. The General Commissioners held that the Wimbledon High School for Girls was a "public school" and allowed the claim. Their decision was reversed by Rowlatt J. and his judgment was affirmed by the Court of Appeal.

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(1) 7 Tax Cas. 611, 619.

(2) (1897) 34 S. L. R. 351; 3 Tax Cas. 537.

(3) (1915) 6 Tax Cas. 642.

(4) 1926 S. C. 934, 941; 11 Tax Cas. 139, 150.

(5) (1888) 21 Q. B. D. 436, 442.

The question which arises for determination is whether there was evidence on which the Commissioners could find that the school in question was a public school during the years in respect of which exemption was claimed. Before dealing with the considerations which led the Courts below to answer this question in the negative, it will be convenient to summarize the facts as found by the Commissioners with regard to the school.

The appellant company was originally incorporated under the Companies Act in the year 1872. Between the years 1905 and 1912, the memorandum and articles of association of the company were altered in consultation with the Board of Education in order to meet the requirements of that Board and to enable the school to receive grants from public funds; and the name of the appellant company was altered to its present title. After the alterations, the capital of the appellant company was 200,005*l.*, divided into 40,000 preference shares of 5*l.* each and 100 new shares of 1*s.* each. The issued capital consists of 30,669 preference shares and 100 new shares. The new shares are held upon the terms of a Deed of Trust by which they are held upon trust to transfer and dispose of the shares and to exercise their rights and powers in such manner as the Board of Education direct. These shares are not entitled to any dividend, but special voting rights are attached to them which enable the Board, through their holders, to exercise in certain circumstances a veto upon proposals to alter the constitution of the company or to wind it up.

The preference shareholders are entitled to a dividend of 4 per cent. per annum free of income tax, cumulative for two years; and they are entitled on a winding up to receive back their capital and two years' arrears of dividend; but there can be no winding up against the will of the holders of the new shares unless the dividends of the preference shares are in arrear for two years.

There are also provisions by which after the year 1956, the preference share capital can be extinguished and the assets of the Trust handed over to a public charitable trust. The school is managed by a governing body consisting of twenty-four persons, of whom one-third are nominated by the Local Education Authority and the remainder appointed by the Council of the Trust.

The fees charged have to be approved by the Board of Education. Free places are awarded in the school to the extent of 10 per cent. of the total number of pupils admitted to pupils who have attended a public elementary school for the preceding two years. So long as the Trust is in receipt of Parliamentary grants it cannot refuse to accept a pupil except on such grounds as the Board of Education considers to be reasonable, and it is bound to receive a certain number of free pupils, including scholars to whom scholarships are allotted by the Local Education Authority.

The Commissioners found as a fact that the school is recognized by the Local Education Authority as providing for the residents of the North Eastern part of the County of Surrey what is commonly described as a "public school education"; that the Council of the Trust consists of persons elected on account of their qualifications to administer education, and that their sole object is to maintain the schools of the Trust at the highest level of efficiency. By the Secondary Schools Regulations, the conditions of the receipt of Parliamentary grants include a requirement that a school receiving Parliamentary grants must not be conducted for private profit. The Board of Education hold that the Wimbledon High School for Girls complies with that condition, and the school has during all material dates been recognized by, and in receipt of Parliamentary grants from, the Board of Education.

The basis of the decision in the Court below is contained I think in the concluding words of the judgment of Lawrence L.J. (1) The learned Lord Justice says: "In my judgment it is essential for the constitution of a public school that no person concerned in its foundation or maintenance should receive a personal pecuniary benefit out of the profits earned by carrying it on."

The question for your Lordships' consideration is whether this opinion is correct. It is common ground that the expression "public school" is in no way defined in the Income Tax Act, 1918, but it is said that there are decisions of great authority which compelled the Court below to reach the conclusion which I have stated: I propose to turn at once to these decisions.

The first, and in some ways the most important, is the case of *Blake* v. *Mayor, &c., of the City of London.* (2) In that case the respondents had made a claim for exemption under the rule corresponding to that now under discussion in respect of a school known as the City of London School. The Commissioners had decided that the school was a public school and had granted relief. Objection was taken to this decision on the ground that fees were charged for admission to the school, and that in order to fall within the exemption, the school must be one at which education was given free. The Court rejected this contention and upheld the allowance of exemption.

In the Court of first instance, Denman J. says (3): "I do not think that the words 'public school' in this Act must be construed as words of art. The question is what is the common understanding of those words, and that is a question not of law but of fact. In many senses the City of London School is a public school according to common understanding; and if some charitable element be necessary in order to satisfy the words creating the exemption, that element exists.

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(1) [1929] 2 K. B. 274, 301.

(2) 18 Q. B. D. 437; (C. A.) 19 Q. B. D. 79.

(3) 18 Q. B. D. 445.

Looking at all the facts before the Commissioners, I am of opinion that they might reasonably come to the conclusion that this was a public school within the meaning of the Act" ; and Hawkins J. concurred in this decision.

In the Court of Appeal the decision was affirmed. Lord Esher M.R. said (1) that he would not attempt to give an exhaustive definition of the term "public school," but that he was of opinion that the City of London School was a public school within the meaning of the rule, and he added : "The object of the school is the education of a sufficiently large number of persons to enable us to say that it is a public object." Fry L.J., in agreeing, says (2) : "It seems to me that it would be unwise to endeavour to lay down any definition in the sense of saying what would or would not be a public school in all cases ; but I think that the school in this case has certain characteristics which denote a public school. It has a perpetual foundation : a portion of its income is derived from charity : it is managed by a public body : no private person has any interest in the school : no profit was or is in the contemplation of its founders or managers : and, lastly, the object of the school is the benefit of a large class of persons. All these circumstances concurring, I think this institution may be said to be a public school." Lopes L.J. said (2) : "I do not propose to attempt to give an exhaustive definition, but I think the intention was to relieve schools not carried on for profit and in which the public were interested, because a sufficiently large number of the public received education there either gratuitously or to a great extent gratuitously."

My Lords, it is plain that the decision in that case does not conclude the present case. All that the Courts decided was that the fact that fees were taken did not prevent a school from being a public school ; but it is suggested that the criteria formulated by Fry L.J. included the absence of any interest of any private person in the school and the absence of any profit in the contemplation of its founders or managers, and that this shows that a school which does not satisfy these criteria cannot be a public school. In my opinion, this is a misconception of the Lord Justice's meaning. Fry L.J. had expressly disclaimed any attempt to lay down a definition of what would or would not be a public school in all cases; but he was indicating some characteristics which enabled him to say that the school in question was a public school. This is not in the least the same thing as saying that no school which does not possess all these characteristics can come within the expression. I have no doubt that the fact that no private person has any interest in the school and the fact that no profit is in the contemplation of its founders or managers are very material aids in reaching the conclusion that a school is a public school; but that does not necessarily involve that unless these facts are present the school must fall outside the clause.

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(1) 19 Q. B. D. 79, 81.

(2) 19 Q. B. D. 82.

In the same way, Lopes L.J. expressly disclaimed any attempt to give a definition and I do not read the Lord Justice's words as meaning that no school from the conduct of which any person could derive pecuniary benefit could in any circumstances be a public school, although no doubt the fact that a school was not carried on for profit would be a very material consideration as pointing in that direction.

Your Lordships were also referred to a decision of the Privy Council in the case of *Dilworth* v. *Commissioner of Stamps.* (1) In that case the question for decision arose under certain New Zealand Acts and the Privy Council had to decide whether a school known as the Dilworth Ulster Institute was a "public institution" within the meaning of a Dominion statute. Lord Watson in the course of delivering the judgment of the Board uses these words: "The context of the Act does not define . . . . what, according to the general understanding of the Colony, constitutes the essential difference between a public and a private school. As these words are used in England, there would be no difficulty in pointing out some schools which are public, and others which are unmistakably private; but it might be troublesome to explain the reason why some schools are called public, whilst others, not very different in their character and circumstances, are known as private. . . . . Schools founded or maintained by the community, and managed by its representatives, are clearly public, while schools conducted by individuals for their own emoluments are as clearly private. . . . . The character of the school, as public or private, must depend, not upon the scholars to whom education is given, but upon the terms on which and the circumstances in which education is given."

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(1) [1899] A. C. 99, 108.

My Lords, the language of Lord Watson commends itself to my judgment apart altogether from the great authority of its author. I think that the terms on which and the circumstances in which education is given are the determining factors, and I think that a school conducted by an individual for his own emoluments would clearly not be a public school. But I do not think that it follows that wherever there is a possibility of any profit arising to an individual in the course of carrying on a school this of necessity prevents the school from having the character of a public school.

A further point was urged on behalf of the Crown that no school could be a public school unless it had a permanent foundation and that this school did not satisfy that test. The contention was based partly on a sentence in Fry L.J.'s judgment, in the case of *Blake* (1), to which I have already referred. The learned Lord Justice said of the City of London School: "It has a perpetual foundation." I have already given what I believe to be the answer to this argument. The learned Lord Justice was not laying down a series of conditions each of which had to be satisfied in order to constitute a public school, but enumerating a series of factors whose combined effect enabled him to regard that particular establishment as a public school. Indeed, it was conceded in argument before your Lordships' House that a public elementary school must be regarded as a public school although it has no perpetual foundation. Reliance was also placed on a decision of Rowlatt J. in the *Birkenhead School, Ld.* v. *Dring.* (2) In that case a limited company carried on a high class secondary school under Articles which provided that no bonus, dividend or profit was to be paid, allotted or divided to or amongst the members. Practically the whole of the receipts of the company arose from fees paid by pupils. The Commissioners found that the school was not a public school and Rowlatt J. upheld that decision.

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(1) 19 Q. B. D. 79, 82.

(2) 11 Tax Cas. 273, 277.

I think this decision was correct. The only fact relied on to make the school a public school was the fact that it was not carried on for private profit and I do not think that this is a conclusive test. The learned judge said in his judgment: "The school has not really any permanent . . . . character about it. . . . . I certainly think that the element of permanency, without using it in its technical sense, which is connoted by the word 'foundation,' something of that sort, is part of the essentials of a public school." If by that the learned judge meant to imply that it was of the essence of a public school that there must be something in the nature of a foundation which rendered it necessary that it should be permanently carried on as such, then I am bound to say that I do not think that he was justified in laying down that principle. The existence of a perpetual foundation is one of the factors which require consideration, but it is not by itself conclusive.

It was further argued that there must be something in the nature of public ownership in order to constitute the school a public school. Again, I would say that ownership or management by a public body would be a factor which has to be taken into account, but I cannot hold that it is an essential condition. I agree with Denman J. in thinking that the question is: What is the common understanding of the expression? And that is much more a matter of fact than of law.

In the present case we have a school which at all material dates was open to the general public, from which the appellant company could not exclude any would-be pupil except with the approval of the Public Education Authority; a large proportion of its pupils are scholars from the public elementary schools; a great proportion of its governing body

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is nominated by the Local Education Authority. We have an express finding of fact that the "sole object" of the Council which carries on the school is to maintain the school at the highest level of efficiency and that the education provided is recognized by the Local Education Authority as being what is commonly described as a public school education.

During all the material dates the school was largely maintained by public moneys and in the view of the Board of Education the school satisfied the regulation which prohibits any Parliamentary grant to a school conducted for private profit. The concurrence of all these factors seems to me to afford ample material to enable the Commissioners to reach the conclusion of fact that this school was a public school, and if there were material on which they could reach that conclusion, it is not open to review by the Courts.

It follows that the appeal should be allowed with costs here and below and I move your Lordships accordingly.

LORD WARRINGTON OF CLYFFE (read by LORD MACMILLAN). My Lords, the only question in this appeal is whether the Commissioners were entitled in law to hold, as they have held, that the Wimbledon High School for Girls, owned and carried on by the appellants, is a public school within the meaning of r. 1 (*c*) No. VI. of Schedule A of the Income Tax Act, 1918.

On a case stated for the opinion of the Court the decision of the Commissioners was reversed by Rowlatt J., and on appeal his order was affirmed by the Court of Appeal (Lord Hanworth M.R. and Lawrence and Slesser L.JJ.).

The ground of the decision of the Court of Appeal was, that the fact that the appellants are authorized to and do in fact apply part of the profits which it earns in paying a dividend to its preference shareholders necessarily prevents the school from being a public school. The real question in the present appeal is whether on this ground the decision can be supported. Lawrence L.J., in giving his judgment, said (1): "If it be open to the Commissioners to find that a school owned by a limited company paying a dividend to its shareholders is a public school, I agree that there is sufficient material in the present case upon which the Commissioners might have come to their conclusion, and that such a finding ought not to be disturbed." With this view I entirely concur. It is quite unnecessary to repeat the detailed statement of the facts contained in the case, but I would call attention to one statement which in my opinion has an important bearing on the question we have to decide. It appears in paragraph 4: "Evidence which we accepted was given that:—(B) The Council of the Trust consists of persons elected on account of their qualifications to administer education, and their sole object is to maintain the schools of the Trust at the highest level of efficiency." In other words, although if, after fulfilling this object, a balance of profit is earned, this may be applied in payment of a rigidly limited dividend to the shareholders, the making of this profit is not one of the objects affecting the actions of those who conduct the affairs of the Trust.

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(1) [1929] 2 K. B. 299.

The Act contains no definition of "public school," and it is therefore the function of the tribunal in each case to say whether the school in question is properly so described. In arriving at a conclusion there are obviously many elements to be taken into consideration, and to say that, whatever the other circumstances may be, the existence or non-existence of one element affords an irrefutable test is open to the objection that by doing so the tribunal pro tanto binds itself by a definition which the statute does not contain.

For myself, without for the present any reference to authority, I should be prepared to hold that the fact that the school is owned and carried on by a limited company whose constitution allows of the payment of a dividend out of profits is nothing more than an element for consideration, and one that bears against the view that the school is a public school, but for all this one that is capable of being outweighed or qualified by others. In the present case I am of opinion that the effect of the bare fact of the possible or actual payment of dividends ought not to be allowed to stand by itself, but should be considered together with the statement quoted above as to the "sole object" with which the affairs of the Trust are run. So considered the fact in my opinion ceases to be conclusive—if indeed it ever were so, which I venture to doubt—and the question is open for decision as one of fact.

As to the authorities: The most important case is *Blake* v. *Mayor, &c., of the City of London* (1), before Denman and Hawkins JJ., and in the Court of Appeal. The question for decision in that case was whether the City of London School, maintained and carried on by the Corporation with the aid of a permanent endowment, was excluded from the class of public schools by the mere fact that fees were taken from the parents and guardians of boys admitted to the school. The Commissioners found in fact that the school was a public school within the meaning of the Act. This finding was upheld in both Courts. Denman J., in giving judgment in the King's Bench Division, makes some remarks very apposite to the present case. He says (at p. 444): "There is no definition of a public school to be found in any text-book or Act of Parliament. The question, therefore, seems to me to be a mixed question of law and fact, and indeed is very much in the nature of a question of fact," and at p. 445, "I do not think that the words 'public school' in this Act must be construed as words of art. The question is what is the common understanding of those words, and that is a question not of law but of fact." With the views so expressed I agree. In the Court of Appeal Fry L.J. said it would be unwise to lay down any definition in the sense of saying what would or would not be a public school in all cases, and with this I concur. He then enumerates certain characteristics which in his opinion denote a public school, one of which was that no profit was in the contemplation of the founders or managers. But this is to say that that fact is one that tells in favour of the conclusion. It would be quite a different thing to say that without it, whatever be the other circumstances, the same conclusion could not properly be reached. This the learned Lord Justice does not say, and in fact implicitly deprecates such a view in the passage I have referred to above. Lopes L.J. goes further, but if he really meant that a school carried on for profit could not under any circumstances be a public school, I venture respectfully to say that I cannot agree and prefer the view expressed by Fry L.J. It was mainly on this case that both Rowlatt J. and the Court of Appeal founded their judgments.

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(1) 18 Q. B. D. 437; 19 Q. B. D. 79.

In *Trustees of the Cardinal Vaughan Memorial School* v. *Ryall* (1) the Commissioners held that the school in question was not a public school, because in their opinion it was denominational. Rowlatt J., in agreement with the Solicitor-General on that point, held that that fact, if it were a fact, did not conclude the matter, and under all the circumstances came to the conclusion that the Commissioners' finding could not be supported. This case then in effect decided that the Commissioners were wrong in law in treating the one fact as conclusive, and is therefore really in favour of the appellants' contention.

The other cases referred to do not in my opinion conflict in any way with the views I have above expressed.

One other point was made in argument for the Crown. It was said that a school cannot be a public school unless it is possessed of some permanent endowment or subject to a trust for charitable purposes. I cannot find any justification for holding that there is in law any such essential condition. Lord Macnaghten's famous judgment in the *Pemsel Case* (2) was referred to, but the point decided in that case was that the expression "charitable purposes" in the Income Tax Act of 1842 included purposes within the wide legal meaning of charity and was not confined to the relief of the poor. It is true that the noble and learned Lord on p. 587 said that on the words of Schedule A the legislature considered the purposes of a public school to be charitable. The advancement of education is among the purposes included in the wide legal meaning of charity, and I think all that Lord Macnaghten meant was that the fact that the legislature

(1) 7 Tax Cas. 611. (2) [1891] A. C. 531.

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coupled public schools with almshouses and hospitals supported his opinion on the point raised for decision.

On the whole I am of opinion that the appeal should be allowed with costs here and below, and the finding of the Commissioners should be restored.

LORD ATKIN. My Lords, the question is whether the Wimbledon High School for Girls is a public school, so as to be entitled to the allowance provided by the Income Tax Act, 1918, Schedule A, VI., r. 1 (*c*): "the amount of the tax charged on any hospital, public school or almshouse in respect of the public buildings, offices and premises belonging thereto." I find it unnecessary to recapitulate the facts. The Commissioners have found that the school is a public school, and if that finding can be supported in law we have no jurisdiction to alter it. It is said, however, that a school cannot be a public school "where a distribution of the profits of carrying it on is made among the proprietors." If that test, which is applied by Lawrence L.J., is correct, the school does not satisfy it. In argument before this House the case of the revenue authorities was put in different language, but to the same effect. No institution, it was said, can be a public school unless it is publicly owned and not privately, that is, owned by a public corporation or by a body of trustees who hold not beneficially but subject to a public charitable trust. My Lords, I am satisfied that the suggested tests are too narrow. The words "public school," as has been said before, are not words of art: they are to be given their ordinary meaning in what context they may be found. In this particular context of exemption from the provisions of the income tax they are first found in collocation with hospitals and almshouses in the Income Tax Act of 1803, Schedule A, IV., 2. At that date I conceive the obvious distinction would be between public school and private school; and such I believe to be the distinction to-day. But, as pointed out by Lord Watson in *Dilworth* v. *Commissioner of Stamps* (1), while there would be no difficulty in pointing out some schools which are public and others which are unmistakably private,

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(1) [1899] A. C. 99, 108.

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it might be troublesome to explain why some schools are called public whilst others not very different in their character and circumstances are known as private. He proceeds: "Schools founded or maintained by the community, and managed by its representatives, are clearly public, while schools conducted by individuals for their own emolument are as clearly private. . . . The character of the school, as public or private, must depend not upon the scholars to whom education is given, but upon the terms on which and the circumstances in which education is given." The circumstances in which education is given will vary as the years pass. Probably in 1803 there were very few public schools which were not charitable foundations; there were certainly very few founded or maintained by the community, whether the State or local authority. At the present date schools founded or maintained by the community outnumber all others; public elementary schools and public secondary schools are obviously public schools. I refer to these facts as demolishing the suggestion that the conditions enumerated by Fry L.J. in the City of London School case are each of them essential to the conception of a public school. The first two are that it has a perpetual foundation: a portion of its income is derived from charity. Neither of these conditions exist in the case of a public elementary school. There seems no reason, therefore, for regarding his fourth condition as any more conclusive: "no profit was or is in the contemplation of the managers." My Lords, I am inclined to think that Lord Watson's test, which in his view clearly put a school behind the line of private school, "a school conducted by individuals for their own emolument," is sufficient for the purposes of the present case. In every respect except for the distribution of profits the school is on the public side of the line: the nature of the education, the public benefits conferred, the extent of public control both locally and generally by the Board of Education and the amount of public money contributed to its maintenance are "circumstances in which the education is given" which to the fullest extent support the finding of the Commissioners.

Does the circumstance that the profits if made are distributed among the preference shareholders in the special terms of the articles of association of the company outweigh all the other considerations ? My Lords, I am satisfied that so to hold would be to give too narrow and technical a construction to the words " public school." It seems to me a travesty of facts to suggest that this school is conducted by individuals for their own emolument. One ought to look at the dominant purpose of those who conduct the school. That seems to me to be, as expressed, to give a public school education to girls. The purpose of making a profit is completely subsidiary. From this point of view there can in substance be no difference between persons who wish to provide public education and do it by vesting the school in a company raising money by debentures at interest and those who do it by vesting the school in a company raising money by preference shares at a limited interest. The former case is the Brighton College case in which I have no doubt that the allowance on Schedule A was rightly made. The latter is the present case. That debenture holders are not proprietors is obvious enough, but the distinction seems to have too great importance when it alone converts public schools into private. My Lords, in my opinion the finding of the Commissioners was one to which they were entitled to arrive on the evidence, and I agree that this appeal should be allowed.

LORD MACMILLAN. My Lords, the appellants are a limited company registered under the Companies Acts and own certain property at Wimbledon in the county of Surrey in which they carry on a school known as the Wimbledon High School for Girls. The question is whether this school is a " public school " within the meaning of Schedule A, No. VI., r. 1 (*c*), of the Income Tax Act, 1918, so as to entitle the appellants to be relieved of the amount of tax charged under Schedule A in respect of the public buildings, offices and premises belonging to the school. The General Commissioners, after considering the facts and contentions of the parties, held that the school was a " public school." Their determination was reversed by Rowlatt J., whose judgment has been affirmed by the Court of Appeal. The circumstance which has been held to be fatal to the appellants' claim is that the preference shareholders of the company, who have provided part of the capital embarked in this and other schools owned by the company, are entitled to receive a dividend on their shares out of such profits as the company may earn from the carrying on of their schools. The dividend is no doubt limited to 4 per cent. but this limitation is immaterial "if," to quote Lawrence L.J., "the existence of the element of profit-making for the private benefit of the founders and managers is fundamentally opposed to the conception of a public school." "In my judgment," says the same learned Lord Justice in conclusion, "it is essential for the constitution of a public school that no person concerned in its foundation or maintenance should receive a personal pecuniary benefit out of the profits earned by carrying it on."

If this be right as a proposition of law there is an end of the matter. With all respect to the learned Lord Justice, who has so admirably focussed the question in debate, and to his colleagues who have agreed with him, I find myself unable to subscribe to their view. The statute does not define the expression "public school." It does not prescribe that no school shall be deemed a public school if any part of the profits earned by conducting it is paid over to the persons who own and manage it. If this is to be laid down as an absolute criterion it must be derived either from previous authoritative judicial interpretation of the expression or from its essential and inherent meaning. So far as authority is concerned it is true that Fry L.J. in *Blake* v. *Mayor, &c., of the City of London* (1), which raised a similar question affecting the City of London School, enumerated "certain characteristics which denote a public school" among which he mentioned that "no private person has any interest in the school: no profit was or is in the contemplation of its founders or managers," while Lopes L.J. expressed the opinion that "the intention was to relieve schools not carried on for

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(1) 19 Q. B. D. 79.

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profit." But both of these learned judges were careful to emphasize that they were not attempting to state an exhaustive definition of a public school. Certain of the characteristics enumerated by Fry L.J. are plainly not essential, for example, that " a portion of its income is derived from charity " for it is admitted that the schools conducted by education authorities out of the rates are public schools within the meaning of the Act. Nor is " a perpetual foundation " an essential.

So far as the expression itself is concerned I do not think that the fact that there is an element of private profit involved necessarily precludes a school " from being what is termed in common parlance a public as distinguished from a private school (1)." The adjective " public " is so elusive in meaning that the authors of the New English Dictionary preface their attempt at definition by the warning that " the varieties of sense are numerous and pass into each other by many intermediate shades of meaning. The exact meaning often depends upon the substantive qualified and in some expressions more than one sense is vaguely present; in others the usage is traditional and it is difficult to determine in what sense precisely the thing in question was originally called 'public'." All are agreed that the expression "public school" as used in the Act is not limited to public schools in the sense of the ancient foundations of Eton and Harrow, though if common parlance were to be the guide this might well be the result.

I certainly regard the circumstance that the owners of a school have a personal pecuniary interest in the profits which it earns as an element of importance in deciding whether the school is or is not a public school. But I do not regard it as decisive in the negative. I think that this element like other elements is examinable. It may be negligible in character or may be more than counterbalanced by other elements. In short all the features of the school must be considered and there is no individual feature the presence or absence of which taken by itself can be said in law to be conclusive of

(1) [1929] 2 K. B. 301, per Lawrence L.J.

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its character as public or private. If the features which are indicative of the school being a public institution predominate then it may fairly be said to be a public school. It is thus a question of degree in every case and that being so there is in the case of this school ample material in the facts which the Commissioners have found proved and which have been detailed in the speeches of the noble and learned Lords who have preceded me to entitle the Commissioners to reach the conclusion which they did. The question resolves itself into one of fact and the determination of it is for the Commissioners and not for this House.

I would only add on the question of the conclusiveness of the element of private profit that the methods in which financial assistance may be given to a public object may obviously vary. A benefactor may give or bequeath a capital sum to enable a school to be founded and endowed or he may lend money to the promoters at no interest or at a low rate of interest or indeed at ordinary rates. In the former case the school would be regarded as possessing one of the characteristics of a public school and in the latter case the school would not be precluded from being regarded as a public school. Does it make all the difference that the promoters have themselves furnished the necessary finance on the footing that they shall receive a limited rate of interest if there is a sufficient surplus of revenue to pay it? The exemption in favour of public schools is to be found in income tax legislation so far back as 1803, long before the existence of limited liability companies, or for that matter of rate-provided schools. The conception of a public school cannot be stereotyped in consonance with the ideas of more than a century ago. If a modern benefactor, in order to assist financially the promotion of an educational project, avails himself of the method of subscribing the requisite funds to a joint stock company, I do not think that that necessarily deprives the institution which he has thus helped to found of the character of a public school. It all depends upon the terms of the transaction and its true object. No one could reasonably say on the facts found in the present case that the Wimbledon

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High School for Girls was "carried on for profit." I therefore concur in the motion that the appeal be allowed.

My Lords, I am desired by my noble and learned friend Lord Thankerton to say that he concurs in the judgment which I have just read.

Order of the Court of Appeal reversed and Determination of the Commissioners for the General Purposes of the Income Tax Acts restored. The respondent to pay to the appellants the amount of the tax paid by them with interest at the rate of 5 per centum per annum from the date of payment: The respondent to pay the costs in the Courts below and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 29, 1930.

Solicitors for the appellants: *Linklaters & Paines.*

Solicitor for the respondent: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

SCOTT (PAUPER) . . . . APPELLANT;

AND

SUMMERLEE IRON COMPANY . . . RESPONDENTS.

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1930
July 28.

Workmen's Compensation—Industrial Disease—False Representation on entering Employment as to previous Immunity—Representation made on re-entering Employment with former Employer after Period of Unemployment—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-s.* 1 (*b*).

The Workmen's Compensation Act, 1925, s. 43, sub-s. 1, enacts that where a workman is certified to be suffering from an industrial disease, "and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement . . . . whether under one or more employers, he . . . . shall be entitled to compensation under this Act . . . . subject to the following modifications:—

"(*b*) If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable":—

Held, that the words "the employment" in modification (*b*) meant any employment, to the nature of which the disease was due, in which the workman was employed within the twelve months previous to the date of disablement.

The appellant, a miner, who had suffered from miners' nystagmus, entered the service of the respondent coal company on April 27, 1927. After two periods of unemployment, during which he received unemployment benefit, he returned to the respondents' colliery on November 7, 1927, and before commencing work wilfully and falsely represented himself in writing as having never suffered from miners' nystagmus. He ceased working for the respondents on August 26, 1928, and was certified as disabled by miners' nystagmus as from that date. Upon a claim by the appellant for compensation, the arbitrator stated that the appellant's employment was continuous from April 27, 1927, down to August 26, 1928, except for the periods when he was temporarily out of work owing to slackness of trade, and as no false declaration was made when he first entered the respondents' service he awarded him compensation.

Held, that the employment of the appellant was not a continuous employment from April 27, 1927, but that his resumption of work with the respondents on November 7, 1927, after a period of unemployment was "entering the employment" within the meaning of modification (*b*), and that, as the false declaration was made by the appellant within twelve months of his disablement, no compensation was payable.

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* *Present:* VISCOUNT HAILSHAM, VISCOUNT DUNEDIN, LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, and LORD THANKERTON.

Decision of the Second Division of the Court of Session in Scotland 1929 S. C. 830 affirmed.

Appeal from an interlocutor of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk, Lord Ormidale, Lord Hunter, and Lord Anderson) upon a case stated by the Sheriff-Substitute of Lanarkshire in an arbitration under the Workmen's Compensation Act, 1925. (1)

The following statement is taken from the opinion of Viscount Dunedin :—

"The respondents were coalmasters and the appellant was a miner and brusher. The facts of the case as found by the Sheriff-Substitute as arbitrator were as follows : The appellant was disabled by the disease known as miners' nystagmus in March, 1924, when he was in the employment of certain other coalmasters. He received compensation from those employers, and finally settled his claim in October, 1925, by accepting a lump-sum payment. He entered the service of the respondents for a short period in March, 1926, and then went to Canada. He returned to this country and again entered the service of the respondents on April 27, 1927. On May 5, 1927, he went to another section of the colliery, where he was under a different brushing contractor. On that occasion he made a declaration in writing that he had at no time suffered from miners' nystagmus. This representation was false and was wilfully made. He remained working till July 2, 1927, when he was paid off owing to slackness of trade, but he came back on August 15, 1927, to the same brushing contractor and continued to work till September 22, 1927. He was then paid off owing to slackness of trade, but on November 7, 1927, he again came back. During both the periods in which he was out of employment owing to having been paid off he received unemployment benefit. Before commencing work on November 7, 1927, he again wilfully and falsely represented himself as having never suffered from miners' nystagmus. He then worked on till April 12, 1928. He left on that date and again received unemployment benefit up to June 15, 1928, except that he worked for one shift on May 23, on which occasion he again repeated his false and wilful declaration. He returned to the colliery on June 15, 1928, and worked till August 26, 1928. On September 1, 1928, he was certified as disabled by miners' nystagmus as from August 26, 1928. He still remained totally incapacitated for work.

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(1) 1929 S. C. 830, where the stated case is set out verbatim.

He claimed under the Workmen's Compensation Acts and the Sheriff-Substitute awarded him compensation. On a stated case the Second Division reversed his award."

1930. May 23. *George Morton K.C.* (of the Scottish Bar) (with him *T. J. Connolly* (of the Scottish Bar) and *A. C. Caporn* (of the English Bar)) for the appellant. The time of entering the employment was a question of fact for the arbitrator, and assuming that there was evidence to support his finding it cannot be reviewed. The words "the time of entering the employment" must receive their popular meaning, and so construed the time when the appellant entered the respondents' employment was April 27, 1927. As no false representation was made on that date the appellant was not barred by s. 43, sub-s. 1 (*b*), of the Workmen's Compensation Act, 1925, from receiving payment of compensation.

[He referred to *Johnstone* v. *Mount Vernon Colliery Co.* (1); *Jones* v. *Ocean Coal Co.* (2); *Gardner* v. *Vickers, Ld.* (3)]

John Carmont K.C. (of the Scottish Bar), *A. G. Erskine Hill*, and *A. M. Wallace* for the respondents were not heard.

The House took time for consideration.

1930. July 28. VISCOUNT DUNEDIN [after a narrative of the facts:] My Lords, the question turns upon the proper application to the above facts of the expression "time of entering the employment" in s. 43, sub-s. 1 (i.) (*b*), of the Workmen's Compensation Act of 1925. The provisions of that section so far as material are as follows :—

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(1) 1929 S. C. 227.

(2) [1899] 2 Q. B. 124, 129.

(3) (1928) 21 B. W. C. C. 129.

"43. (1.) Where—(i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed :—

. . . .

and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement . . . . whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease . . . . were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications :—

(*a*) The disablement . . . . shall be treated as the happening of the accident;

(*b*) If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable;

(*c*) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due: Provided that—

(i.) the workman or his dependants if so required shall furnish that employer with such information as to the names and addresses of all the other employers who employed him in the employment during the said twelve months as he or they may possess, and, if such information is not furnished, or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer upon proving that the disease was not contracted whilst the workman was in his employment shall not be liable to pay compensation; and (ii.) if that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer, and not whilst in his employment, he may join such other employer as a party to the arbitration, and if the allegation is proved that other employer shall be the employer from whom the compensation is to be recoverable; and

(iii.) if the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation, or, if the amount of compensation is not in dispute, as may be determined by arbitration under this Act."

The learned Sheriff-Substitute, after narrating the facts as above stated, said: "The employment of the claimant was continuous from April 27, 1927, down to August 26, 1928, except that for the periods hereinbefore noted he was temporarily out of work on account of slackness of trade." As there was no false declaration made at April 27, 1927, he held that the claimant was not barred from claiming compensation.

The first question that arises is whether this pronouncement by the Sheriff as arbitrator is a finding in fact which cannot be touched by the tribunal on review. I am clearly of opinion that the learned judges of the Second Division were right in holding that it was not. The actual dates of employment had been given. What the Sheriff said was that the employment so described was in law a continuous employment. That seems to me wrong, because the gap from July 2, 1927, to August 15, 1927, a time during which the workman was neither in actual work, nor in contractual relation with the respondents makes it in my opinion impossible so to hold. The same reasoning, however, applies to the gap between April 12, 1928, and June 15, 1928, so that if the matter

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depended on continuity of employment, there was no continuity from November 7, 1927, to August 26, 1928, the date of his disablement. If, then, the employment which he entered was the renewed employment at June 15, 1928, at which time he made no declaration as to the nystagmus, he would be entitled to recover. The question, therefore, comes to be, what is "the employment" referred to in s. 43, sub-s. 1 (*b*)? I have come to be of the opinion that the judgment of the learned judges of the Second Division is right, and that the employment is the employment referred to in the earlier portion of the section—namely, the employment within twelve months previous to the accident. The Lord Justice-Clerk says: "The meaning of (*b*) as I read the statute is that if it is proved that the workman has at the time of entering any employment in which he was employed at any time within the twelve months previous to the date of disablement whether under one or more employers wilfully and falsely represented himself as not having previously suffered from the disease his compensation is forfeited." I think this follows from a careful consideration of the other portions of the section. At the beginning of the section, after mention of the disease which causes the workman to be disabled or suspended from work, it goes on to say "and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid was a personal injury." Thus the disease may be referred to any employment during the twelve months. It goes on to say that the compensation shall be recoverable from the last employer, but provides that (ii.) the employer may join up a former employer in whose employment he says the disease was contracted, and if he proves his allegation may recover the compensation from him, and (iii.) if the disease is of a gradual character, then the various employers are each to bear their share as may be found by arbitration. All this points to the employment during the twelve months being looked at as one employment so far as the disease is concerned. Now, if this be so, in this case the employment which extended during the last year before the certificate of disablement was the employment which began on November 7, 1927, and before entering that employment he made a false and wilful declaration.

I accordingly agree with the learned judges of the Second Division and move that the appeal be dismissed.

VISCOUNT HAILSHAM. My Lords, I agree. The first question is whether on the facts stated there was evidence on which the learned Sheriff-Substitute could find that the appellant was continuously employed by the respondents from April 27, 1927. In my opinion the learned judges in the Court below were clearly right in holding that he could not so find. During the periods when the appellant was out of work and in receipt of unemployment benefit not only was he not working for the respondents, but the respondents were under no obligation to employ him if work were available and he was under no obligation ever to return to their service. There was certainly no substantial continuity of the relationship of master and servant in the sense in which that phrase is used and explained in *Jones* v. *Ocean Coal Co.* (1)

But if this is so, the same reasoning applies to the intervals between April 12 and May 23 and between May 23 and June 15, 1928, and the employment in which the appellant was working at the date of his disablement commenced on June 15, 1928, on which date he made no declaration. Therefore, the question is directly raised as to the meaning of the expression " the employment " in proviso (*b*) of sub-s. 1 of s. 43 of the Workmen's Compensation Act, 1925, and it is necessary to examine the language of that sub-section somewhat closely.

The sub-section begins by requiring a certificate that the workman is suffering from a disease mentioned in the Schedule of the Act and is thereby disabled from earning full wages at the work at which he was employed. If that certificate is obtained, it has next to be shown that the disease is due

(1) [1899] 2 Q. B. 124.

to the nature of any employment in which the workman was employed at any time within twelve months previous to the date of his disablement whether under one or more employers. If that condition is satisfied, then the workman is entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of that employment, subject to certain modifications. Of these the first provides that the date of disablement shall be treated as the date of the accident and the next, with which we are immediately concerned, that "if it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable."

My Lords, it is noteworthy that down to this point nothing has been said as to the person by whom the compensation is to be payable; the statute has conferred upon the workman the right to receive compensation on conditions which it has prescribed. Further, it is to be noted that the statute does not purport to afford a defence against the workman's claim to an employer who has been misled by the misstatement; it renders the misstatement a disqualification of the workman from the right to receive compensation. "The employment" in proviso (*b*) must grammatically be "that employment" previously mentioned in the sub-section, i.e., any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement to the nature of which the disease is due. If, then, the literal interpretation of the statute be taken, a workman who has made a misstatement at the time of entering an employment to the nature of which a disease is due at any time within twelve months before the date of the disablement is disqualified from receiving compensation; and it is immaterial whether that misstatement is made to the particular employer who is the respondent in the arbitration.

Is there anything in the succeeding provisos to modify this view or to induce the Court to say that it is inapplicable? In my opinion, the language of the rest of the sub-section confirms the construction to which the literal reading of the words points. Proviso (*c*) enacts that the compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due with a proviso that, if that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer and not while in his employ, he may join such other employer as a party and, if such allegation is proved, that other employer shall be the employer from whom the compensation is to be recovered; and, further, if the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as may be determined by arbitration. These provisions seem to me very difficult to apply if proviso (*b*) is construed in any other sense than that which I have indicated; and in the case of a disease contracted by a gradual process the appellant's contention would involve that, if the last employer had not obtained a written statement, either the previous employer who had done so would be deprived of his protection by the omission of the last employer, or else the last employer would be deprived of his right to contribution by reason of the misstatement made by the workman to an earlier employer. There seems no justice or reason in either alternative, and they are both avoided by giving to the earlier proviso the construction which I have already indicated.

In my opinion the reasoning of the judgments in the Court of Session, particularly that of Lord Hunter, is conclusive and it follows that the appeal must be dismissed.

LORD BUCKMASTER (read by LORD TOMLIN). My Lords, the question on this appeal depends entirely on the construction of s. 43 of the Workmen's Compensation Act whose terms have already been quoted by Lord Dunedin.

Two constructions are possible (1.) that the employment on the entering of which the workman made a false statement was the actual engagement under which he was working when he was disabled by the disease, or (2.) that it was the employment, of the same nature as that in which he was disabled, in which he was employed at any time within the twelve months previous to the date of disablement.

The first would appear on a superficial glance at the section to be the most obvious interpretation, but I am satisfied that a closer examination of all the provisions shows that it is incorrect.

By sub-head (*c*) of sub-s. 1 of s. 43 the compensation is recoverable from the employer "who last employed the workman during the said twelve months in the employment to the nature of which the disease was due." If, therefore, the first construction were adopted, the employer could have no defence based on sub-head (*b*) unless the workman had made a false statement on entering his last employment.

Miners' nystagmus is a disease which, when once it has affected a workman, may, although apparently cured, suddenly —even in a few hours—again develop and render the then employer liable for compensation, even though its real cause were due to earlier employments. The injustice of throwing the whole burden of compensation in cases such as these on the last employer is clearly realized in the statute, and is met by the provisions of sub-s. 1, (*c*), (iii.).

This enables the employer, primarily liable, to obtain contributions from the other employers, such contributions to be determined in the arbitration. The right of the workman against the last employer for the full compensation is left unaffected, it is the employer who obtains relief against the earlier employers. If each of these earlier employers would have had a defence based on a misrepresentation by the workman in a claim made directly against him, it seems to me such defence must necessarily be available against the claim for contribution. No one can be rendered responsible by third party procedure for something for which in no circumstances could he have been primarily liable. It would follow, therefore, that false statements made by the workman in his earlier employment would, upon this construction of the statute, throw upon his last employer a burden from which he would be relieved had no such false statements been made, a conclusion so manifestly unfair that it leads at once to the consideration of whether there is not some other reading of the statute, equally open on the words, by which this result can be obviated. Such a reading is, in my opinion, to be found and is one which, apart from the considerations I have mentioned, is a perfectly reasonable interpretation of the statute.

The words "the employment" in sub-s. 1 (*b*) are nowhere explained in this head of the clause. It is necessary to revert to the earlier words of the section to ascertain the exact meaning. We there find that it is "any employment in which the workman was employed at any time within the twelve months previous to the date of disablement," and in this sentence an employment must necessarily mean an employment to the nature of which the disease was due.

If, therefore, within the period of the twelve months before entering the employment to which the disease was due the workman made the wilfully false statement referred to, no compensation is recoverable. This is, in my opinion, the true meaning of the clause, and it is emphasized by the fact that the final words of sub-s. 1 (*b*) make the compensation irrecoverable against anybody and not specifically against the person to whom the false statement was made. This only leaves the consideration of whether the employment in this case was a continuous employment beginning on April 27, 1927, or whether on each occasion when work ceased that employment was broken and a new one commenced. The latter seems to me the only reasonable view. During the periods of enforced idleness there was no employer, there was no employment. The mere fact that work was resumed with a former employer cannot make the employment one continuous whole. The workman might in the intervals have found similar work with another

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employer, and then resumed it with the one for whom he formerly worked. In such a case continuity of employment would have been unarguable, and I cannot see the difference when the gaps in the employment were unfortunately unfilled.

LORD WARRINGTON OF CLYFFE (read by LORD TOMLIN). My Lords, this case raises a short point of construction under s. 43 of the Workmen's Compensation Act, 1925—namely, that part of the Act which deals with industrial diseases.

The scheme of this part of the Act is well known. If a certifying surgeon certifies that the workman is suffering from one of the diseases in the Act mentioned—of which miners' nystagmus is one—and the disease is due to the nature of the employment in which the workman was employed at any time within the twelve months previously to the date of the disablement, whether under one or more employers he shall be entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of his employment. Provision is made for casting the liability in certain cases upon an employer or employers other than that one in whose employment the workman was at the date of disablement. Sect. 43 contains the following sub-s. 1 (*b*): "If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable."

In the case of the present appellant the date of disablement was August 26, 1928, and the twelve months therefore commenced on August 26, 1927. On two separate occasions during that period—namely, on November 7, 1927, and May 23, 1928—the appellant wilfully and falsely represented himself in writing as not having previously suffered from the disease. At the commencement on June 15, 1928, of the final period of employment no representation was made. The arbitrator held that neither of these representations was made "at the time of entering the employment" inasmuch as the workman had been continuously in the employment

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of the respondents from a date anterior to the first of such representations, and made an award in his favour.

On a special case stated by him the Second Division of the Court of Session unanimously held that the arbitrator's view was erroneous and answered in the negative the question whether he was entitled to make an award of compensation.

In my opinion the decision of the Second Division was correct. The first question is what is "the employment" which the workman is said to be entering when he makes the false representation. I think it means not that in the course of which the disablement occurs but any employment during the twelve months to the nature of which the disease is due. The Act regards the disease as the result of such an employment whenever during the twelve months it begins. The representation if made disentitles the man to compensation altogether, not merely from the employer to whom it was made. But assuming I am right in my view as to what is meant by the employment, the further question arises as to what is meant by entering it. The man's only employers during the twelve months were the respondents and he had also been employed by them before the beginning of the twelve months. The first representation after the beginning of that period was on November 7, 1927. On that day he was re-employed by the respondents after an interval of several weeks during which he had been in receipt of unemployment benefit. During this interval no contract of employment between the respondents and the appellant existed and I entirely agree with the Lord Justice-Clerk that on November 7, 1927, he entered the employment within the meaning of the Act. It is true that this and other intervals in employment were due to slackness of trade but I cannot think that this fact justified the arbitrator in arriving at what was really an inference of continuous employment from the facts found by him rather than a finding of fact in itself.

For these reasons I agree that this appeal should be dismissed.

LORD THANKERTON. My Lords, the only question that arises in the present appeal is whether the appellant is

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disentitled to compensation by reason of proviso (*b*) of sub-s. 1 of s. 43 of the Act, which provides as follows: "(*b*) If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable."

The facts stated in the case have already been fully recapitulated by your Lordships.

The learned arbitrator has held that the employment of the appellant by the respondents was continuous from April 27, 1927, until the date of disablement, and that the appellant "entered the employment" on April 27, 1927, on which date he made no declaration. After that date there were five periods of actual employment, the last three periods being wholly within the twelve months. The appellant made three false declarations, the first of which may be ignored. The second declaration was made on recommencing work on November 7, 1927, for the third period, and the third declaration was made on recommencing work—for one shift only—on May 23, 1928, for the fourth period, both these declarations being within the twelve months.

During each of the intervals between the five periods of actual work the appellant drew unemployment benefit. On the facts as found by the arbitrator I am of opinion that he was not entitled to hold that the employment was continuous from April 27, 1927. In my opinion the drawing of unemployment benefit is inconsistent with continuance of the relationship of employer and employed. It follows that the appellant entered a new employment at the commencement of the third and fourth periods of work on November 7, 1927, and May 23, 1928, on both of which occasions he made a false declaration in writing, and again entered a new employment on June 15, 1928, when he made no declaration.

There remains the question as to whether the employment in proviso (*b*) of sub-s. 1 of s. 43 means the last employment previous to disablement or any employment within twelve months previous to disablement. The immediate antecedent is the words "that employment" just before proviso (*a*) and these words clearly refer to the earlier phrase "any employment in which the workman was employed at any time within the twelve months previous to the date of disablement or suspension, whether under one or more employers." Further, proviso (*b*) is a condition of the right to compensation, and the last employer is not mentioned except in the provisos which deal with the method of recovery of the compensation. I am therefore of opinion that the making of a false declaration on entering any employment within the twelve months, to the nature of which the disease is due, whether with the last employer in the last or any previous employment, or with another employer previously, will disentitle the workman to compensation.

I agree with the decision of the Second Division of the Court of Session, and with the careful reasoning of Lord Hunter. I therefore agree with the motion.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed.

Lords' Journals, July 28, 1930.

Agents for the appellant: *Caporn & Campbell, for John Y. Robertson, Hamilton, and Ross & Ross, S.S.C., Edinburgh.*

Agents for the respondents: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* 1930 July 29.

WHITE . . . . APPELLANT;

AND

LONDON AND NORTH EASTERN RAILWAY COMPANY . . . . RESPONDENTS.

Workmen's Compensation—Partial Disablement—Average Weekly Earnings—Able to Earn—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 3.

The appellant, who was totally incapacitated by an injury by accident arising out of and in the course of his employment by the respondents whilst working as a fitter in the erecting department of their works, on becoming fit for light work, was employed by the respondents in the gauge department of their works. A claim by him for compensation in respect of the difference between his pre-accident earnings and his present earnings was opposed by the respondents on the ground that the full week's work in that department was five and a-half days, but that owing to trade conditions the department was only working five days, and that, if the appellant had worked a full week, as he was physically capable of doing, his earnings would have exceeded his pre-accident earnings. The arbitrator awarded compensation:—

Held, on the facts, that the respondents had failed to prove that a normal week's work in the gauge department was more than five days and that the award was rightly made.

The question whether, where a partially disabled workman is actually earning wages, the compensation to which he is entitled is to be assessed by reference to the normal earnings under normal market conditions in that employment or by reference to his actual earnings in the conditions prevailing at the time was left open by the House.

Per Viscount Hailsham: *Semble,* it does not necessarily follow from *Bevan* v. *Nixon's Navigation Co.* [1929] A. C. 44, where a man is actually earning wages in a suitable employment and the wages which he is receiving are the wages usually paid at the time in that employment, that the arbitrator is bound to assess his compensation on the basis of what he would have been earning if the conditions of employment in that occupation had been more prosperous.

Cardiff Corporation v. *Hall* [1911] 1 K. B. 1009; *Bevan* v. *Nixon's Navigation Co.* [1929] A. C. 44; and *Lyon* v. *Taylor* (1928) 21 B. W. C. C. 415 distinguished.

Dykes v. *William Baird & Co.* 1929 S. C. 555 discussed.

Decision of the Court of Appeal (1929) 22 B. W. C. C. 613 reversed.

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* *Present*: VISCOUNT HAILSHAM, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD MACMILLAN.

Appeal from an order of the Court of Appeal varying an award of the judge of the Durham County Court in an arbitration under the Workmen's Compensation Act, 1925.

On July 28, 1927, the appellant sustained personal injury by accident arising out of and in the course of his employment by the respondents whilst working in the erecting department of the respondents' works at Darlington. His average weekly earnings in that department, calculated in accordance with the Act, amounted to 2*l.* 18*s.* 9*d.*, and the average number of days per week during the preceding twelve months on which work was available was four and three-quarter days.

The appellant was totally incapacitated by his accident from July 28 to October 14, 1927, and was paid compensation by the respondents on that footing. On October 14, 1927, he accepted employment in the respondents' fitting shop and worked therein five and a-half days in each week till February 15, 1928. He then became again totally incapacitated and remained so till August 28, 1928. On August 28, 1928, light work was provided for him in the respondents' gauge department and he had since been so employed. Equally with the other persons employed in that department the appellant in his new grade worked five days a week and his average weekly earnings amounted to 2*l.* 15*s.* 1*d.* If the persons employed in that department had been called upon to work five and a-half days a week the appellant would have been able to work for that time, and in that case he would have been paid an average weekly sum of 3*l.* 0*s.* 11*d.* No one in fact in the appellant's new grade had been provided with work for more than five days a week, or had been able to earn more than 2*l.* 15*s.* 1*d.*

The appellant claimed to be entitled to compensation in respect of the difference between his pre-accident earnings of 2*l.* 18*s.* 9*d.* and the 2*l.* 15*s.* 1*d.* at present earned by him in the gauge department.

The respondents alleged that a full week in the gauge department was five and a-half days, but that owing to trade conditions the department was only working five days, and that the appellant was able to earn in a suitable employment at least as much as his average weekly earnings at the time of the injury.

The county court judge refused to assume that the appellant was able to earn a hypothetical figure for a hypothetical week's work which neither he nor his fellow workmen in the department had any opportunity to undertake. He accordingly awarded the appellant compensation at the weekly rate of 1*s.* 10*d.*, being one-half the difference between 2*l.* 18*s.* 9*d.* and 2*l.* 15*s.* 1*d.* The respondents appealed.

The Court of Appeal, by a majority (Lord Hanworth M.R. and Romer L.J.; Slesser L.J. dissenting) varied the award by substituting a declaration of liability for the award of compensation.

1930. June 24, 26. *Croom-Johnson K.C.* and *W. Shakespeare* (with them *V. B. Foden Pattinson*) for the appellant. The question raised by the appeal is, what is the meaning of the words "is earning or is able to earn" in s. 9, sub-s. 3, of the Workmen's Compensation Act, 1925, which determines the measure of compensation to be paid to a partially disabled workman. Where a partially disabled workman is employed on light work and there is no other suitable employment open to him at which he could earn higher wages the figure to be taken is the amount he is actually earning, or, if the figure to be taken is the amount he is able to earn, the amount he is actually earning must be taken to be the amount he is able to earn. What a workman is able to earn must mean what he is in fact able to earn under existing conditions. In the present case the arbitrator was justified in confining himself to the conditions prevailing at the time of the award without embarking upon hypothetical inquiries as to the earning capacity of the appellant: *Dykes* v. *William Baird & Co.* (1); *Heathcote* v. *Haunchwood Collieries* (2); *Portland Colliery Co.* v. *Murray.* (3) In *Cardiff Corporation* v. *Hall* (4) and *Bevan* v. *Nixon's Navigation Co.* (5) the workman had

(1) 1929 S. C. 555.
(2) [1918] A. C. 52, 55.
(3) [1923] A. C. 566, 574.
(4) [1911] 1 K. B. 1009.
(5) [1929] A. C. 44.

been unable to find any suitable employment owing to labour conditions. These cases do not affect the present case, because there was here no evidence that a normal week's work in the department in which the appellant was employed was five and a-half days.

[They also referred to *Lewis* v. *Guest, Keen & Nettlefold, Ld.* (1); *Lyon* v. *Taylor* (2); *Perry* v. *Wright.* (3)]

Sir Walter Greaves-Lord K.C. (with him *Norman Fox-Andrews*) for the respondents. The falling off in the appellant's earning capacity is not due to anything personal to him, but is due to trade conditions. He has the physical capacity to work the full time, but owing to slackness of trade the gauge department is only working for five days. All that the employer insures is the man's physical capacity. The county court judge misdirected himself in holding that the appellant was not able to earn at the material time wages equal to his pre-accident earnings.

Croom-Johnson K.C. added nothing in reply.

The House took time for consideration.

1930. July 29. VISCOUNT HAILSHAM. My Lords, this is an appeal from an order of the Court of Appeal reversing the decision of the county court judge sitting as arbitrator under the provisions of the Workmen's Compensation Act, 1925. The facts which give rise to the appeal are as follows:—

The appellant was a fitter employed by the respondent company in their erecting department from the year 1921 onwards. On July 28, 1927, he met with an accident arising out of and in the course of his employment, and was thereby totally incapacitated until October 14, 1927. Before the accident he had been employed upon piece work and had earned during the preceding twelve months 2*l.* 18*s.* 9*d.* per week on an average. Accordingly, while he was totally incapacitated he received compensation at the rate of 1*l.* 9*s.* 5*d.* per week. On October 14 he resumed work in

(1) [1928] 1 K. B. 20. (2) 21 B. W. C. C. 415.
(3) [1908] 1 K. B. 441.

the respondents' fitting shop and continued working there until February 15, 1928. During this period he was working as a member of a gang which pooled their wages, and his earnings were equal to those which he received before the accident. In February, 1928, his fellow workers complained that he was not able to do his fair share owing to his incapacity, and, after he had been examined by the respondent company's doctor, he stopped work and was again given compensation of 1*l.* 9*s.* 5*d.* per week on the footing of total incapacity.

On August 28, 1928, the respondent company engaged him on light work in their gauge department; there he was paid by time, and worked on an average for five days a week, receiving an average of 2*l.* 15*s.* 1*d.* weekly wage. Five days a week was the total time for which the gauge department was working during this period. No evidence was adduced that any other works were working for a longer period than five days a week, and no evidence was adduced as to the normal time during which similar works were kept open; some evidence was given that "full time" in this gauge department was five and a-half days, which I understand to mean that this was the maximum time for which a workman could be asked to work at ordinary rates, and beyond which overtime rates would have to be paid.

The question to be determined turns upon the meaning to be attached to the words which are now contained in sub-s. 3 (i.) of s. 9 of the Workmen's Compensation Act of 1925—namely: "The weekly payment in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident."

The county court judge awarded to the appellant 1*s.* 10*d.* a week on the basis of partial incapacity, and in his note he said: "I award the applicant a weekly payment equal to half the difference between the amount of his average weekly earnings before the accident, and the average weekly amount which he is actually earning in his present suitable employment with the respondents. I refuse to assume that he is able to earn a hypothetical figure for a hypothetical week's work, which neither he nor his fellow workmen in the gauge department have any opportunity to undertake." The Court of Appeal reversed this decision on the ground that the case was covered by previous authority; and they relied mainly upon three cases: *Cardiff Corporation* v. *Hall* (1); *Bevan* v. *Nixon's Navigation Co.* (2); and *Lyon* v. *Taylor.* (3)

It will be convenient to turn at once to these cases in order to see what they decide.

In *Cardiff Corporation* v. *Hall* (1) it was proved that a workman previously employed as a driver had been incapacitated from resuming his occupation of driver, but was able to do any form of light work, but that he had applied for various forms of light work without success. The Court of Appeal held that, notwithstanding his inability to obtain light work, it was competent to the county court judge to find that his total incapacity had come to an end and that his compensation should be reduced. The basis of the decision is, I think, to be found in the judgment of Buckley L.J. where he says: "Inability to earn . . . . is inability to get employment owing to some incapacity for work personal to the workman to the exclusion of inability to get employment owing to the state of the labour market. The employer may be called an insurer of 'capacity for work,' but he is not an insurer of a 'right to work.'"

This case was considered in your Lordships' House in the case of *Bevan* v. *Nixon's Navigation Co.* (2), where a workman employed as a collier contracted nystagmus, which disabled him from working underground but left him fit for work on the surface, and he worked at a reduced wage as a surface labourer until the closing down of the pit. The pit had since been reopened but the workman had been unable to obtain any suitable employment. On an application for increased

(1) [1911] 1 K. B. 1009, 1027. (2) [1929] A. C. 44.
(3) 21 B. W. C. C. 415.

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compensation, the county court judge found that, but for the nystagmus, the workman would have been employed as a collier at underground work, at wages at least equal to his pre-accident wages, and that his inability to get surface work was solely due to labour conditions, and he fixed the compensation on the footing that the workman must be taken to be able to earn wages at the then current rate for surface work, and this award was upheld. The ground of the decision is to be found in the judgment of Lord Dunedin. He points out that the decision in the *Cardiff* case (1) had received statutory recognition in the Act of 1923 in the provisions now incorporated in sub-s. 4 of s. 9 of the Act of 1925, which seem necessarily to exclude the idea that " able to earn " referred to any circumstances not personal to the man himself; and he holds that the decision in that case must be accepted as correct in any case arising under the later Act.

In *Lyon* v. *Taylor* (2) the facts were that a workman had been engaged as a labourer at the rate of 42*s*. 6*d*. for a 47-hour week, and that at this rate of remuneration his pre-accident earnings amounted to 50*s*. including overtime and bonus. He met with an accident and ultimately returned to work as a labourer at the same rate of wages as before, although he was only able to do lighter work and, owing to slackness of trade, his earnings only amounted to 37*s*. 8*d*. a week. The county court judge dismissed a claim for compensation on the ground that he found "no loss of earning capacity since return to work." The Court of Appeal upheld this decision.

In addition to these cases, your Lordships have had cited the case of *Dykes* v. *William Baird & Co.* (3), which was not referred to in the argument in the Court below. In that case a miner who had become totally incapacitated by nystagmus was paid compensation as if totally incapacitated until he obtained light work at a colliery. The colliery, in common with the other collieries in the district, was working short time owing to the economic depression in the coal

(1) [1911] 1 K. B. 1009. (2) 21 B. W. C. C. 415.
(3) 1929 S. C. 555.

trade, and accordingly the workman, who was paid by the shift, had in some weeks a number of idle shifts. No other work was available for him in which he could earn higher wages. The Court of Session held that, as the workman was employed, and there was no other employment open to him at which he could earn higher wages, the proper figure to take in assessing compensation was the amount he was actually earning, and that even if the figure to be taken was the amount he was able to earn in the present case, the amount he was actually earning must be taken as the amount he was able to earn since short time was general in the collieries in the district and no other employment was open to him.

In the present case it seems to me that the ground of the judgment of the Court of Appeal is to be found in a few words in the judgment of the Master of the Rolls. The learned Master of the Rolls says: "*Cardiff Corporation* v. *Hall* (1) stands as an authority that the compensation which the workman is entitled to is that which is to be apportioned to his injury in a normal market, apart from the difficulties superadded by industrial conditions. . . . It appears clear from the evidence that this man, who has been for a long time in the employment of the railway company, both before and since the accident, has, in the course of his time with the railway company, worked at 5½ days a week. He has worked less, and he has worked at full time. He is at the present time working only at 5 days per week, and not at full time, but that is because of the labour conditions, and I do not see that there is any evidence that it is right to say that his working 5 days per week is owing to some physical disability which prevents his working for the full 5½ days a week."

My Lords, it seems to me that the decision of the Court of Appeal rests on two propositions, one of fact and the other of law. The proposition of fact is that five and a-half days a week is the normal working time in the appellant's present employment; the proposition of law is that where a man is actually earning wages, the compensation to which he is entitled is to be assessed by reference to the normal earnings under normal market conditions in that employment, and not by reference to his actual earnings in the conditions prevailing at the time. The proposition of law is plainly inconsistent with the decision in the Scottish case of *Dykes* v. *William Baird & Co.* (1) and the point raised is of general importance. It does not seem to me necessarily to be covered by the decision of your Lordships' House in the case of *Bevan.* (2) In *Bevan's* case the House was dealing with a case in which the workman was unable to earn anything, but that inability was due to market conditions and not to any physical disability of the workman. I do not think that it necessarily follows from that case, where a man is actually earning wages in a suitable employment and the wages which he is receiving are the wages usually paid at the time for that employment, that the arbitrator is bound to assess his compensation on the basis of what he would have been earning if the conditions of employment in that occupation had been more prosperous. If a man is prevented by injury from following his pre-accident occupation and is compelled to adopt a less remunerative occupation, it is a little difficult to see why the resulting loss of earnings is not occasioned by his injury, even though the lower wage which he earns in his new employment results in part from the economic conditions prevailing in that employment, whether they be reflected in a reduction of pay or a reduction in the hours of work.

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(1) [1911] 1 K. B. 1009.

When that question has to be determined, no doubt the language used by Lord Moulton in the *Cardiff Corporation* case (3) will have to be carefully considered, as well as the decision of this House in *Heathcote* v. *Haunchwood Collieries.* (4) But in the present case it does not seem to me that it is necessary to decide this question, because I cannot accept the proposition of fact on which the Court of Appeal had proceeded. I do not think that there was any evidence that a normal week's work in the employment in which this man was engaged after August, 1928, was five and a-half

(1) 1929 S. C. 555.
(2) [1929] A. C. 44.
(3) [1911] 1 K. B. 1009, 1020.
(4) [1918] A. C. 52.

days. There is no doubt that five and a-half days is full time, that is, the maximum amount of time for which the employers could claim to pay at the ordinary rate of wage without resorting to overtime, but I find no evidence that any one has ever worked five and a-half days a week in the gauge department of this company, or in any other similar works. I have no doubt that, if there were sufficient work to do, the employers would have kept the men at work for five and a-half days; I see no reason to suppose that they would have stopped at five and a-half days if there had been work which required doing, and which would need longer hours. There is no evidence even that the time worked in the gauge department was the same as that worked in the fitting shop: in the fitting shop there is evidence that the appellant worked five and a-half days on an average between October, 1927, and February, 1928, and that he worked the same number of days between April 6, 1927, and July 28, 1927; but equally there is evidence that, from July 25, 1926, to January 9, 1927, he worked four days, and from January 10 to April 6, 1927, he worked five days, so that his average for the twelve months before his accident was four and three-quarter days.

I do not think that the arbitrator was bound on this evidence to come to the conclusion that five and a-half days was the normal week's work in the fitting shop, still less that he was bound to hold that it was the normal week's work in the gauge department. I think that, on the evidence, the learned arbitrator was quite entitled, in his own language, to "refuse to assume that the appellant was able to earn a hypothetical figure for a hypothetical week's work which neither he nor his fellow workmen in the gauge department had any opportunity to undertake." It follows, in my opinion, that this appeal succeeds and the award of the learned county court judge should be restored, and I move your Lordships accordingly.

LORD WARRINGTON OF CLYFFE (read by LORD MACMILLAN). My Lords, in this case the appellant is a workman who on

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July 28, 1927, suffered injury by accident arising out of and in the course of his employment. He was totally incapacitated for work from July 27 to October 14, 1927, on which day he accepted employment from the respondents, which continued until February 15, 1928, when he again became totally incapacitated. On August 28, 1928, light work was again provided for him, and he was employed upon it at the date of the arbitration.

The question arises on the true construction of s. 9, sub-s. 3, of the Workmen's Compensation Act, 1925, which is as follows: "The weekly payment in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident."

It was found by the county court judge that the amount of the average weekly earnings before the accident ascertained in accordance with the Act was 2*l.* 18*s.* 9*d.*, and that the average weekly amount which he was actually earning in suitable employment with the respondents at the date of the award was 2*l.* 15*s.* 1*d.*, and he awarded him as compensation a weekly payment equal to one-half the difference between these two amounts. It was contended by the respondents that as the 2*l.* 15*s.* 1*d.* was the amount earned for five days' work only, and as the ordinary full time was five days and a-half, for which a man would earn 3*l.* 0*s.* 11*d.*, the county court judge ought to have treated the appellant as able to earn the latter amount, the fact that he did not earn it being due not to his incapacity but to slackness of work.

It was proved that no man in the same employment under the respondents was actually earning more than the 2*l.* 15*s.* 1*d.*, and under these circumstances the judge, to use his own words, refused to assume that the workman was able to earn a hypothetical figure for a hypothetical week's work which neither he nor his fellow workmen in his department had any opportunity to undertake.

The respondents appealed to the Court of Appeal, who by a majority (Slesser L.J. dissenting) discharged the award and substituted therefor a declaration of liability.

What, then, is meant by "is able to earn"? The first question is as at what time is his ability to earn to be tested? This must obviously be the date of the award. At that date he is earning so much money, and no man in the same employment can earn more. Under those circumstances I should have thought, looking at the words alone, that it is reasonably clear that he is earning all he can earn at the material time, and that such amount must be taken as the true figure for comparison with the amount of pre-accident earnings. It may well be that physically he is capable of working a greater number of hours a week and so earning more money, and that he is prevented from doing so by slackness of trade, but taking the words themselves there is nothing to indicate that the workman is to be treated as able to earn an amount which he is physically capable of earning, although as a matter of fact he cannot possibly do so.

I respectfully agree with the views expressed by the learned judges in the Court of Session in *Dykes* v. *William Baird & Co.* (1), a case on all fours with the present. Speaking of the duty of the arbitrator under the section in question, the Lord Justice-Clerk says: "His duty is expressed in the simplest language, and, to my mind, it seems prima facie unnecessary in this case to travel beyond the first of the two alternative inquiries which he is directed to make. What in point of fact was this man earning after the accident?" The learned judge, however, proceeds to consider what would happen if the arbitrator had to inquire what the workman is able to earn, and he comes to the conclusion that the criterion is not what the workman ought or could earn at a different time and in different circumstances, but one to be applied at the time of the inquiry. The other learned judges used similar expressions in their judgments. If authority were required this case covers the point; it is, of course, not binding on this House, but I suggest that it is one your Lordships should approve.

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(1) 1929 S. C. 555, 559.

Such a case as *Bevan* v. *Nixon's Navigation Co.* (1), and the case of *Cardiff Corporation* v. *Hall* (2), which it approved, seem to me not to be in point. They both are cases of men who, though physically able to do certain work, had been unable to obtain it and were therefore earning nothing.

In *Bevan's* case (1) the judge had found that, though the workman—a miner suffering from nystagmus—was disabled from working underground, he was fitted for surface work, for which at current rates he would be paid a certain sum per week, and that he could not get surface work solely on account of labour conditions, and under those circumstances he felt himself bound by the *Cardiff* case (2) to hold that the workman was on the true construction of the Act able to earn the wages for surface work and awarded accordingly. The Court of Appeal held that he was right, and this House took the same view. The real point in the present case—namely, whether where a man is earning the full wage payable at the material time for the work he is doing it is necessary to embark on the further inquiry what under non-existing circumstances he might be able to earn was not raised or discussed.

Lyon v. *Taylor* (3) was a case nearer to the present inasmuch as the workman was in fact earning wages, and at the same rate as before the accident, though of a smaller amount owing to trade conditions. The wages he would have earned if the accident had not happened would not have exceeded the amount earned after the accident. It was there held by the county court judge and by the Court of Appeal that the workman had not shown a loss of earning capacity due to the accident. This case also is in my opinion clearly distinguishable from the present.

Heathcote's case (4) is more nearly akin to the present case. There a workman was actually earning wages at a suitable employment, and it was held in this House that this was prima facie what he was able to earn, and in order to displace this conclusion it was not sufficient for the employers

(1) [1929] A. C. 44.
(2) [1911] 1 K. B. 1009.
(3) 21 B. W. C. C. 415.
(4) [1918] A. C. 52.

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to prove that in another suitable employment he would be able to earn higher wages. The case is important only because the noble and learned Lords who decided it agreed that where wages are being earned in a suitable employment prima facie at all events those are the wages the man is able to earn.

On the whole, then, I am of opinion that the county court judge was right in refusing to embark on the consideration of hypothetical circumstances in order to displace the effect of the actual earnings, and this appeal should be allowed, and the order of the Court of Appeal should be reversed with costs here and below.

LORD ATKIN. My Lords, the argument for the employer proceeds on the assumption that to ascertain the wages an injured workman earns or is able to earn after the accident it is necessary to adjust the wages he actually is earning by reference to a normal standard of wages which in possibly different trade conditions he would be able to earn. I agree with the noble Viscount on the Woolsack that in the present case there was evidence upon which the county court judge could find that here there was no proof that the actual wages earned were by reason solely of trade conditions lower than normal. It becomes unnecessary therefore to resolve the question whether the initial assumption is sound. But as it appears to receive support from the decision in the Court of Appeal in *Lyon* v. *Taylor* (1) I think it desirable to state that I have considerable difficulty in accepting that decision as correct. The wages which a man is in fact earning at any particular time are determined by the industrial conditions of that time. To ascertain a " norm " to which the actual wages are to be adjusted would impose upon the arbitrator in most cases an inquiry indefinite, lengthy and expensive. Over what period of time is the norm to be ascertained, is it to be judged by time, or by rate, or by actual earnings ? Unfavourable conditions are met in some trades by reduction of hours, in others by reduction of rates. Earnings may be affected

(1) 21 B. W. C. C. 415.

in some works by inadequate equipment, inefficient organization, or unskilful management. I find it difficult to suppose that the arbitrator is called upon to engage in so elusive a problem, and should at present be inclined to favour the view taken by the Court of Session in *Dykes* v. *William Baird & Co.* (1) I do not however desire to decide the point but content myself with expressing this doubt in respect of a point of far-reaching consequences if applied generally in assessing compensation. I agree that this appeal should be allowed and the award of the learned county court judge restored.

LORD MACMILLAN. My Lords, I concur in the judgment of the noble and learned Viscount on the Woolsack.

VISCOUNT HAILSHAM. My Lords, I am asked by my noble and learned friend Lord Thankerton to say that he concurs in the judgment which I have already delivered.

Order of the Court of Appeal reversed, and award of the county court judge restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House. Cause remitted back to the County Court of Durham to do therein as shall be just and consistent with the judgment of this House.

Lords' Journals, July 29, 1930.

Solicitors for the appellant: *Pattinson & Brewer.*
Solicitor for the respondents: *I. B. Pritchard.*

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(1) 1929 S. C. 555.

[PRIVY COUNCIL.]

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1930
July 29.

OFFICIAL ASSIGNEE OF THE ESTATE OF CHEAH SOO TUAN . . . . . APPELLANT;

AND

KHOO SAW CHEOW . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE STRAITS SETTLEMENTS (PENANG).

Straits Settlements—Bankruptcy—Conveyance made within two years of Bankruptcy—Conveyance made in good faith and for valuable consideration—Onus of Proof—Bankruptcy Ordinance (No. 44, *Laws of Straits Settlements,* 1926), *s.* 50.

The Bankruptcy Ordinance of the Straits Settlements provides by s. 50, sub-s. 1: " Any settlement of property, not being . . . . a settlement made in favour of a purchaser . . . . in good faith and for valuable consideration, ... shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void as against the official assignee"; and by s. 50, sub-s. 3: "'Settlement' for the purposes of this section includes any conveyance or transfer of property . . . .":—

Held, that upon the true construction of the above section the onus is upon the official assignee to prove that a conveyance which he is seeking to set aside thereunder was not made in good faith and for valuable consideration.

Judgment of the Court of Appeal of the Straits Settlements affirmed.

APPEAL (No. 136 of 1929) from an order of the Court of Appeal of the Straits Settlements (Penang), dated April 8, 1929, reversing an order of the Supreme Court and ordering a new trial.

The appellant moved the Supreme Court for an order, under s. 50 of the Bankruptcy Ordinance of the Straits Settlements, setting aside a conveyance, dated June 2, 1926, whereby Cheah Soo Tuan, who had been adjudicated a bankrupt on June 10, 1927, purported to convey to the respondent (who was admitted to be his secondary wife) certain property in consideration of $5000.

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* *Present:* VISCOUNT DUNEDIN, LORD TOMLIN, and LORD RUSSELL OF KILLOWEN.

The material terms of s. 50 are stated in the judgment, also certain facts which were agreed before the hearing.

Sproule J., who heard the motion, set aside the conveyance. He ruled that the onus of proof was upon the respondent and called upon her counsel to begin, which he did. He called the respondent and other witnesses; evidence was called also in support of the motion, and notes of the public examination were put in by consent.

The Court of Appeal set aside the order and ordered a new trial. The learned judges held that the onus had been wrongly placed upon the present respondent, and that although the onus had been accepted there should be a new trial, as the erroneous view as to its incidence had affected the decision of the learned judge.

1930. July 14. *Pritt K.C.* and *G. R. Mitchison* for the appellant. Having regard to the agreed facts the onus was not upon the official assignee. Whether it were so or not the respondent having accepted and acted upon the ruling cannot complain unless substantial injustice resulted: *Brandford* v. *Freeman.* (1) The question of the onus of proof did not affect the trial; both parties called such evidence as they wished to call. Upon the whole evidence the trial judge rightly held that the conveyance was fraudulent and not one made in good faith.

The respondent did not appear.

July 29. The judgment of their Lordships was delivered by

Lord Tomlin. This is an appeal by the official assignee of the estate of Cheah Soo Tuan, a bankrupt, from an order of the Court of Appeal of the Straits Settlements (Settlement of Penang) dated April 8, 1929.

By the order of which the appellant complains the Court of Appeal set aside a judgment dated July 17, 1928, of Sproule J. and ordered a new trial. Sproule J. had declared that a conveyance dated June 2, 1926, by the bankrupt to his secondary wife, the respondent, of No. 121 Beach Street.

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(1) (1850) 5 Ex. 734.

Penang, was void as against the appellant and ought to be set aside, and ordered delivery up of such conveyance.

By s. 50, sub-s. 1, of Ordinance No. 44 relating to Bankruptcy it is provided: "Any settlement of property, not being . . . . a settlement made in favour of a purchaser . . . . in good faith and for valuable consideration, ... shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void as against the official assignee." And by sub-s. 3: "'Settlement' for the purposes of this section includes any conveyance or transfer of property. . . ."

The bankrupt was the sole proprietor of a "chop" or business called Guan Hup Hin. On June 10, 1927, he was adjudicated bankrupt upon an act of bankruptcy dated May 18, 1927.

Less than a year before the act of bankruptcy—namely, on June 2, 1926, the bankrupt had conveyed a property belonging to him to his secondary wife, the respondent. The property in question with an adjoining piece of land, had been purchased by the bankrupt in November, 1919, from Yap Chor Ee for $35,000, of which $30,000 was left on mortgage to Yap Chor Ee. Later the bankrupt sold the adjoining land for $10,000, which he paid to Yap Chor Ee, thus reducing the latter's mortgage to $20,000. By the conveyance of June 2, 1926, the property in question was conveyed to the respondent, subject to Yap Chor Ee's mortgage for $20,000. The consideration expressed to be paid was $5000, and the conveyance contained a covenant by the respondent to pay all principal moneys secured by the mortgage and to keep the bankrupt indemnified against the same.

On August 24, 1927, the appellant moved the Supreme Court for an order setting aside the conveyance under s. 50 of Ordinance No. 44.

At the trial certain facts were agreed (1), and the learned judge then called on the respondent's counsel to begin, ruling that the onus of proof lay on the respondent.

(1) The agreed facts stated in the judge's note were the facts above mentioned.

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In the course of the trial the depositions of the bankrupt on his public examination, and of the respondent upon her examination under s. 31 of the Ordinance were "formally put in by consent."

The learned judge reserved his judgment and delivered it on April 26, 1928. He stated that the respondent's counsel at the hearing accepted the burden of proof upon admitted facts. He outlined those admitted facts, which were in substance the facts to which reference has already been made. Upon the construction of s. 50 of the Ordinance he held that the burden of proof was thrown upon the respondent. He further held that $25,000 was under value, but he added that he could not find it was gross under-value. At the end of his judgment the learned judge said: "Upon the whole I could not find that she" [i.e. the respondent] "had proved that the conveyance to her of the property was genuine—I thought indeed that it was tainted with fraud intrinsically and apart from any question of the onus of proof." He then declared the conveyance absolutely void.

Upon appeal by the respondent the Court of Appeal directed a new trial, holding that the trial judge had adopted a wrong construction of s. 50 of the Ordinance with regard to the onus of proof, and had accordingly misdirected himself.

Deane J., who delivered the leading judgment, concluded his judgment in the following words: "For these reasons I have come to the conclusion that the learned judge misdirected himself as to the onus, and that the result of the misdirection was very serious, since it coloured his whole outlook as to the facts and substantially prejudiced the appellant's" [meaning thereby the present respondent's] "chances. It is true that the learned judge, after stating that he could not find that she (the appellant) had proved that the conveyance of the property to her was genuine proceeded, 'I thought, indeed, that it was tainted with fraud intrinsically, and apart from the question of the onus of proof,' but putting aside the difficulty of understanding what is meant by saying that a conveyance is tainted with fraud 'intrinsically' when on the face of it there is nothing suspicious except that it is a conveyance by a husband to a wife, I do not think that a mere casual expression of this kind with nothing to support it can cure so serious a defect as there was in this trial. In my opinion the judgment of the lower Court should be set aside and a new hearing of the motion ordered. In view of the fact that appellant's counsel in the Court below made no demur to the ruling that the onus was upon him, I think there should be no order as to the costs of this appeal; the costs of the first hearing of the Court below should abide the result of the new hearing."

Their Lordships are of opinion (1.) that the trial judge was wrong in his construction of s. 50 of the Ordinance; (2.) that there was nothing in the admitted facts to shift the onus of proof to the respondent, and (3.) that the respondent ought not to be precluded from objecting to the judgment, as the judge's note shows that the respondent's counsel was called upon to begin as the result of the ruling given as to onus.

The fact that the wrong party was called upon to begin, taken alone, might not be sufficient ground for a new trial. Here, however, there was more. The trial judge had taken an erroneous view as to the law in regard to onus. His mind was coloured by that view, and he was thereby disabled from weighing evenly the evidence. Thus the respondent was placed at a disadvantage as the direct result of the trial judge's error.

In their Lordships' judgment the order of the Court of Appeal was correct and the language of Deane J., which has been already quoted, adequately and accurately expressed the position and the conclusions which should follow from it.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed.

Solicitors for appellant: *Nisbet, Drew & Loughborough.*

[PRIVY COUNCIL.]

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Nov. 17.

ABAKAH NTHAH . . . . APPELLANT;

AND

ANGUAH BENNIEH . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY.

Gold Coast—Native Tribunals—Land held under Native Tenure—Weight attaching to Decision—Native Jurisdiction Ordinance, 1883 (*Laws of the Gold Coast Colony,* 1928, *c.* 113), *ss.* 11, 17.

The Native Jurisdiction Ordinance, 1883, of the Gold Coast provides by s. 11 that the civil jurisdiction of a native tribunal shall extend to hearing and determining certain classes of suits, including all suits relating to the ownership or possession of lands held under native tenure and situated within its jurisdiction; and by s. 17 that when it appears to any Court that a case brought before it is one cognizable by a native tribunal the Court shall, unless satisfactory reasons to the contrary be shown, refer the parties thereto.

A suit of the class mentioned above having been tried and decided by a native tribunal, the decision was reversed upon the evidence by the Provincial Commissioner, and his judgment was affirmed upon a further appeal to the Supreme Court:—

Held, that having regard to the provisions of the Ordinance the decision of a native tribunal in a matter of the above kind, being one peculiarly within its knowledge, if arrived at after a fair hearing and on relevant evidence, should not be disturbed without very clear proof that it was wrong, and in the present case there was no such proof.

Judgment of the Supreme Court reversed.

APPEAL (No. 165 of 1927) from a judgment of the Supreme Court of the Gold Coast Colony, Eastern Province (February 23, 1926), affirming a judgment of the Provincial Commissioner for the Western Province (September 23, 1924) which reversed a judgment of the Native Tribunal of Atteraboe.

The litigation arose out of a suit between two native chieftains brought in the native tribunal as to the ownership of lands in the Kampuni district held under native tenure. The original parties both died before the present appeal;

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* *Present:* VISCOUNT DUNEDIN, LORD ATKIN, and LORD RUSSELL OF KILLOWEN.

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the appellant and respondent above-named were respectively substituted for the original defendant and plaintiff—namely, Abakah Kangah and Kweku Ackah.

The native tribunal derived its jurisdiction from the Native Jurisdiction Ordinance, 1883, being now c. 113 of the Laws of the Gold Coast Colony, 1928; the effect of ss. 11 and 17 of the Ordinance is stated in the judgment, from which also the facts appear.

The native tribunal dismissed the suit. That decision was reversed on appeal to the Provincial Commissioner and judgment entered for the plaintiff. Upon a further appeal to the Full Court of the Supreme Court the judgment of the Provincial Commissioner was affirmed.

1930. Oct. 16, 17. *Sir W. Brandford Griffith* for the appellant.

T. J. O'Connor K.C. for the respondent.

Nov. 17. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from the Full Court of the Gold Coast Colony in an action in which the present respondent, Chief of Bakanta, as plaintiff, sought to establish his right to certain land, described as Kampuni land, against the defendant, the present appellant, the Chief of Ampani. The action was tried in the native tribunal, the court of the paramount chief of the district, who sat himself with his counsellors. The native tribunal gave judgment for the defendant: on appeal to the Provincial Commissioner the appeal was allowed and judgment given for the plaintiff, and on further appeal to the Full Court the decision of the Provincial Commissioner was affirmed. The area of the land in dispute was imperfectly defined in the summons, which states that the plaintiff claims "to establish title to Kampuni land which defendant had permission from plaintiff's predecessor Ercheni, and dwelt on the said land for farming purpose." The plaintiff, however, at the hearing defined the land in dispute by reference to an affidavit sworn by him in a previous suit in which the land was described as "in the neighbourhood of

Ayanzil, bounded on one side by Amanzuli river, on another side by the Aibi river, on the other side by lands belonging to Chief Yanwah Amgbonsah of Amihere Blay Bukasu, and on the other side by Fia River." This description specifies ascertained rivers which form the boundaries on the south, east and west. By reference to the map it is seen that the land lies near the coast; the Amanzuli river, which forms the southern boundary, flows easterly parallel with the coast, leaving a strip of land between it and the coast, on which are situate the villages of Bakanta and Ayansini. The river then flows southward into the sea, and on the coast, east of the mouth of the river, is the defendant's village, Ampani. The strip of coast line between the river and the sea is, as to the part immediately west of the river mouth, the property of the plaintiff, and if his property projected northwards beyond the Amanzuli it would include part, at any rate, of the land claimed, including the village of Kampuni. The plaintiff's case was that the land in question was his ancestral land, and that the defendant was only in occupation of part of it, and of that by express permission of the plaintiff's predecessor in title, granted at defendant's request about fifteen years before suit. He called a witness who spoke to the interview. This story was not accepted by the native tribunal or by the Provincial Commissioner or the Full Court.

The defendant's case was that his ancestors originally owned the strip along the coast as well as the land north of it on the north side of the Amanzuli; that he had founded the village Kampuni, and had exercised rights of ownership over it, levying tribute or rent from the natives, who had taken up portions of it for farming. The native tribunal, after a long hearing of witnesses, made an extensive personal survey of the land in dispute accompanied by the litigants, obtaining information from the natives by the way, and putting such further questions to the parties as they thought desirable. No complaint is made of the conduct of the tribunal, who seem to have impartially fined witnesses on either side whom they considered to have given false evidence. Both litigants were fully cross-examined by the Court. An

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objection was indeed made that the tribunal had improperly rejected the evidence of the plaintiff's witness to the licence as hearsay, whereas he professed to have been present. It is only necessary to say that all the Courts have rejected this part of the plaintiff's case. It was not pressed before their Lordships, and the question as to the admissibility of the evidence has become immaterial.

In the result the Court delivered judgment for the defendant. They found that there was no substantial evidence of the permission under which the plaintiff alleged the defendant held. They attached importance to the fact that the neighbouring chiefs claimed to be forming boundary with the defendant, that the defendant had for twenty years cultivated cocoa on the land, but the plaintiff had not demanded any tribute from him, that the defendant had collected tribute from the farmers on the land up to the present time. They considered defendant's account of his ancestral title supported by the local terminology, which pointed to an original migration from Aitirainoo as alleged by the defendant, and also by an order from the then paramount chief to the defendant's grandfather to sacrifice his nephew to the Amanzuli river to induce the river, which had overflowed, to return to its proper channel. This order, the tribunal remarks, would not have been given unless the grandfather had been a chief. It is satisfactory to know that the preparations for the sacrifice appeased the river, and that it returned to its bank before the consummation.

By colonial legislation all suits relating to the ownership of land held under native tenure are placed within the exclusive original jurisdiction of native tribunals, unless satisfactory reason to the contrary is shown. It appears to their Lordships that decisions of the native tribunal on such matters which are peculiarly within their knowledge, arrived at after a fair hearing on relevant evidence, should not be disturbed without very clear proof that they are wrong, and their Lordships fail to find such proof in the present case. The Provincial Commissioner determined the case on the evidence before the trial Court and on further evidence taken in his Court. He

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also had a view of the land in question, but his survey was not as complete as that of the native tribunal. He also was accompanied for part of the journey by the litigants, and he records in his notes of his survey that both parties agreed that Kampuni lands extend down to the sea.

Relying on this agreement the Commissioner in his judgment defined Kampuni lands as extending from the sea coast northwards, and allowing the appeal, gave judgment that the lands, as above described, belonged to the plaintiff.

Their Lordships cannot regard this extension of the boundaries in dispute as satisfactory. In view of the admission by the defendant, made definitely both in the native Court and before the Commissioner, that at the present time Bakanta and Ayansini belonged to the plaintiff, it seems probable that there has been some misunderstanding as to the admission; but in any case in view of the legislation referred to, it appears quite irregular to have extended the dispute so as to give the Commissioner, on appeal, original jurisdiction over land which had never been in dispute before the native tribunal, and as to which there was no reason for interfering with their jurisdiction if the dispute had been raised before them. The unfortunate effect of this misunderstanding was that the Commissioner, who relied for his decision upon his view of the effective occupation of the land in dispute, took into account the occupation of the littoral, as to which the defendant made no claim. Their Lordships are far from saying that the admitted ownership of the littoral was not evidence which the tribunal was entitled to take into account in considering proof of title to the ownership of the bush land north of the river; but it should not have been treated as admitted ownership and occupation of the land in dispute. The actual oral evidence before the Commissioner does not appear to have added anything of substantial value to what was given before the trial Court.

The Full Court were unable to find any reason for differing from the Commissioner's view as to the weight of effective occupation. They do not appear to have had their attention drawn to the extension of the area in dispute to which their

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Lordships have already referred. In the result there appears to have been no sufficient reason for disturbing the decision of the native tribunal, which should be restored.

As there appear to be other possible claimants to this land it may be advisable to state the obvious proposition that this judgment only determines the rights between the plaintiff and the defendant.

Their Lordships will humbly advise His Majesty to allow the appeal and restore the judgment of the native tribunal, dated October 23, 1923. The respondent must pay the costs of this appeal and of the appeals before the Provincial Commissioner and the Full Court.

Solicitors for appellant: *A. L. Bryden & Williams.*
Solicitors for respondent: *Strellett, Mercer & Co.*

[PRIVY COUNCIL.]

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Nov. 18.

N. R. M. N. RAMANATHAN CHETTY . Appellant;

AND

M. K. A. MEERA SAIBO MARIKAR . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Roman-Dutch Law—Wrongful Seizure of Goods—Sheriff's Warrant—Person causing Seizure of wrong Goods—Absence of Malice.

Under Roman-Dutch law, as under English law, if a defendant has caused the fiscal or sheriff to seize the plaintiff's goods under a warrant directing him to seize the goods of a different person, the plaintiff can recover damages against the defendant without proving malice.

Hart v. *Cohen* (1899) 16 Buch. S. C. R. 363 and *De Alwis* v. *Murugappa Chetty* (1909) 12 Ceylon N. L. R. 353 approved.

Judgment of the Supreme Court of Ceylon reversed.

Appeal (No. 96 of 1929) from a decree of the Supreme Court of Ceylon (February 20, 1929) reversing a decree of the District Court of Colombo (April 30, 1928).

The appellant brought a suit in Ceylon against the respondent to recover damages resulting from a seizure of his goods by the fiscal under a search and seizure warrant.

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* *Present:* Lord Atkin, Lord Russell of Killowen, and Lord Macmillan.

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The facts appear from the judgment of the Judicia Committee.

It was conceded at the trial that the defendant was barred by res judicata from contending that the plaintiff was not owner of the goods seized.

The trial judge gave judgment for the plaintiff for damages. He held that, if proof of malice was necessary, it was proved in that the defendant had caused the warrant to issue by a false statement intentionally made.

An appeal to the Supreme Court was allowed. Fisher C.J. (with whom Garvin J. concurred) referred to *Corea* v. *Peiris* (1), in which the Privy Council held that under Roman-Dutch law the onus upon the plaintiff in an action for malicious prosecution was the same as under English law. In his view the same principle applied in the present case, and the action failed, as the plaintiff had not proved malice or want of reasonable cause.

Neither Court in Ceylon considered whether upon the evidence the defendant had caused the goods to be seized under the warrant.

1930. Oct. 20, 21. *De Gruyther K.C.* and *H. I. P. Hallett* for the appellant. The decision in *Corea* v. *Peiris* (1) does not affect this case, as the warrant did not authorize the seizure of the plaintiff's goods. The distinction between an act done without authority of the Court and one done under an authority improperly obtained is recognized in Roman-Dutch law as well as in English law : *Hart* v. *Cohen* (2) ; *De Alwis* v. *Murugappa Chetty.* (3) Here the goods did not belong to the person named in the warrant, and the evidence shows that the defendant caused them to be seized as being goods to which it applied. In those circumstances the plaintiff was entitled under English law to damages without proof of malice : *Jarmain* v. *Hooper* (4) ; *Smith* v. *Keal* (5) ; *Morris* v. *Salberg.* (6) The Ceylon decision already referred

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(1) [1909] A. C. 549.
(2) 16 Buch. S. C. R. 363, 368.
(3) 12 Ceylon N. L. R. 353.
(4) (1843) 6 Man. & G. 827.
(5) (1882) 9 Q. B. D. 340.
(6) (1889) 22 Q. B. D. 614.

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to shows that that is also the case in Ceylon. In any case upon the evidence the defendant acted without reasonable cause and maliciously in causing the warrant to be issued.

Dunne K.C. (with him *Parikh* and *Abdul Majid*) for the respondent. The evidence does not show that the respondent directed the fiscal to seize the particular goods seized, or did any act making him liable for the wrongful seizure. He represented the creditors in applying for the issue of the warrant; there was reasonable ground for thinking that the insolvent's goods were being removed. He is not responsible for the wrongful act of the fiscal.

Nov. 18. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. This is an appeal from a decree of the Supreme Court of the Island of Ceylon reversing a decree of the District Court of Colombo. The relevant facts can be briefly stated. The parties to the action were both of them creditors of Nana Moona Mohamado Rawther & Co., who carried on business as tea merchants at Nos. 35 and 65 Second Cross Street, Colombo, and who may be conveniently referred to as "the firm." On June 18, 1925, the firm filed their petition in insolvency.

The respondent, who carried on business at No. 69 Second Cross Street, and had heard of the insolvency, observed that tea was, on June 21, 1925, being removed from the firm's premises at 65 Second Cross Street.

The tea was on that day being removed in pursuance of an agreement which had been come to between the firm and the appellant on June 16, 1925, whereby tea and other goods were invoiced by the firm to the appellant at a sum of Rs.21,700, the appellant being debited with that amount in account. In fact, large quantities of tea had already, in pursuance of this arrangement, been removed on June 16 and 17 from the firm's premises to the appellant's premises, No. 102 Sea Street.

The respondent and certain other creditors of the firm became, not unnaturally, suspicious, and on June 21, 1925, they entered into an agreement to take the necessary Court proceedings, by appointing one of themselves as "leading person." The respondent appears to have been selected for this purpose.

Before referring to the Court proceedings which were taken by the respondent, it is convenient to state at once, that by a judgment delivered in the District Court of Colombo on September 14, 1925, it was decided (and the matter is res judicata between the parties to this appeal) that the tea in question was sold by the firm to the appellant on July 16, 1925, and was the property of the appellant.

On June 22, 1925, the respondent presented a petition to the District Court of Colombo asking (amongst other relief) that the fiscal might be ordered to seize the goods specified in the petition at the respective places therein specified. The petition specified the goods and places in the following words: "The insolvents have after their insolvency removed the following goods and deposited them in the several places set out hereinafter. Tea of the approximate value of Rs.5000 has been removed by the insolvents to No. 42 Prince Street, Colombo, the store of K. M. S. Sego Mohamado. Nana Rawanna Mana Nana Suppiah has from June 19 to 21 removed tea of the value of about Rs.30,000 to his store at Sea Street, Colombo, flour, sugar and maldive fish were removed to Gampola on June 18, and I understand that M. S. H. Abdul Ally was handed over 29 bags of flour, tea and maldive fish." An affidavit sworn by the respondent in support of the petition contained an allegation in identical words. The reference to Nana Rawanna Mana Nana Suppiah is a reference to the appellant's agent, Supranamian, who had removed the tea to 102 Sea Street.

As a result of his application, the respondent obtained the issue of a search warrant to the fiscal on June 22, 1925. The warrant, after reciting that there was reason to suspect and believe that property of the firm was concealed "at No. 65 and 35 Second Cross Street, No. 42 Prince St. Skinners Road, and at Sea Street," proceeded in the following terms: "These are therefore by virtue of the Insolvent Ordinance, 1853, to authorize and require you with necessary and proper assistants

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to enter in the day time into the premises aforesaid and there diligently to search for the said property and if any property of the said insolvents shall be there found by you on such search that you seize the same to be disposed of and dealt with according to the provisions of the said Ordinance."

The fiscal executed the said warrant by entering No. 102 Sea Street and seizing large quantities of tea there, which tea must, as hereinbefore mentioned, be taken to have been, at the time of the seizure, not the property of the firm, but the property of the appellant.

That the respondent was the cause of the fiscal seizing these goods seems clear. The appellant's agent, Supranamian, in his evidence in chief, said: "In his petition the defendant asked that among other goods the tea removed to my store also should be seized. Certain goods left at my stores at 102 Sea Street were seized. Defendant came with the fiscal's officer to our store and pointed out the goods which were seized." There was no cross-examination as to this. It is true that the respondent, in the course of his own cross-examination, denies the statement, but their Lordships are satisfied that he or some one on his behalf must have given the information which the fiscal and his officer necessarily required, to enable them to ascertain not merely the goods which were to be seized, but also the particular house in Sea Street in which the goods would be found.

The goods which were seized were ultimately sold, and on May 10, 1926, the appellant commenced the present action against the respondent, claiming damages for the wrongful seizure of his goods.

The District Judge gave judgment for the appellant for Rs.8274.80, with interest and costs.

The basis of his judgment was that the respondent had acted maliciously in causing the appellant's goods to be seized, the malice being, in his opinion, established by the fact that the respondent had intentionally made a false allegation in order to obtain the issue of the warrant—namely, that the tea had been removed to Sea Street *after* the insolvency.

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The judgment of the District Judge was set aside in the Supreme Court, and judgment was entered for the present respondent with costs there and below. The foundation of the Supreme Court's decision was that no malice on the part of the present respondent had been proved.

In the opinion of their Lordships the facts of the present case relieve the appellant from any necessity to establish malice on the part of the respondent.

Assuming, in the respondent's favour, that he had grounds for suspecting the conduct of the firm and the appellant, and that in obtaining the issue of the search warrant he acted in good faith and without malice, nevertheless, the fact remains that he was the cause of the appellant's property being wrongfully seized.

That in itself is, in their Lordships' opinion, sufficient to give the appellant a cause of action, and to entitle him to recover from the respondent whatever damage he can establish to have been caused to him by the wrongful seizure.

A distinction must be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ or warrant which authorized the seizure, the seizure is lawful, and no action will lie in respect of the seizure, unless the person complaining can establish a remedy by some such action as for malicious prosecution. If, however, the writ or warrant did not authorize the seizure of the goods seized, an action would lie for damages occasioned by the wrongful seizure without proof of malice.

These propositions not only state the law of this country upon the subject, but they are supported by decisions in the Courts of countries where the Roman-Dutch law prevails.

Authorities of this class which may be referred to are *Hart* v. *Cohen* (1), a decision of the Supreme Court of the Cape of Good Hope, and *De Alwis* v. *Murugappa Chetty* (2), a decision of the Supreme Court of Ceylon.

In the case before the Board, once it was shown, as it has been, to their Lordships' satisfaction, that the respondent

(1) 16 Buch. S. C. R. 363, 368.

(2) 12 Ceylon N. L. R. 353.

was the cause of the appellant's goods having been seized by the fiscal under a warrant which directed him to seize only property of the firm, the case against the respondent was complete, and he became liable to the appellant in damages without proof of malice.

The District Judge assessed the damages at Rs.8274.80. Their Lordships see no reason for suggesting that this sum is other than a fair and proper amount fixed by the District Judge after due consideration of the evidence.

For the reasons above stated, their Lordships are of opinion that this appeal should be allowed and the decree of the District Court restored, and they will humbly advise His Majesty accordingly. The respondent must pay the appellant's costs of the appeals to the Supreme Court and to His Majesty in Council.

Solicitor for appellant: *O. A. Cayley.*
Solicitor for respondent: *H. S. L. Polak.*

[PRIVY COUNCIL.]

YOUNG . . . . APPELLANT;

AND

CANADIAN NORTHERN RAILWAY COMPANY . . . . RESPONDENTS.

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Nov. 25.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Canada (Manitoba)—Wrongful Dismissal—Terms of Employment—Agreement between Employers and Labour Organization—Contractual Obligation to individual Employee.

The appellant was verbally engaged in 1920 by the respondents, a railway company, as a machinist in their shops at the "going rate" of wages. In 1927 he received notice of dismissal on the ground of reduction of staff. He sued for wrongful dismissal, contending that a written agreement, entered into by the respondents with a labour organization and called Wages Agreement No. 4, formed part of his contract of employment, and that under it the respondents could not

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and CHIEF JUSTICE ANGLIN.

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dismiss him upon a reduction of staff, as they had retained men junior to him. The agreement had been applied to the appellant (who was not a member of the organization) as to the amount of his wages, the notice given him, and in other respects; the respondents stated at the trial that they had applied the agreement to all the men employed in their shops:—

Held, that Wage Agreement No. 4 did not form part of the contract for the employment of the appellant, the fact that the respondents had applied it to him being equally consistent with the view that they had done so as a matter of policy. Further, that having regard to the terms and nature of the agreement it did not by itself constitute a contract between any individual employee and his employer; observance of its terms by an employer could not be enforced by action even by the organization, but only by calling a strike.

Judgment of the Court of Appeal for Manitoba affirmed.

APPEAL (No. 60 of 1930) from a judgment of the Court of Appeal for Manitoba (February 3, 1930) affirming a judgment of the Court of King's Bench for that Province (July 10, 1929).

The appellant brought an action against the respondents for wrongful dismissal in circumstances which are stated in the judgment of the Judicial Committee.

The trial judge dismissed the action, and that decision was unanimously affirmed by the Court of Appeal. The grounds of the judgments below, which differed, appear from the judgment in the present appeal.

1930. July 18, 21, 22, 24. *Bergman K.C.* and *McMurray* for the appellant.

Laird K.C. and *Hair K.C.* for the respondents.

Nov. 25. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. In this case the appellant, who had been in the employ of the respondents (hereinafter called "the railway company") as a machinist, sued the railway company for damages for wrongful dismissal and for other relief. His action was tried in the Court of King's Bench for Manitoba by Dysart J. and was dismissed. An appeal from that judgment to the Court of Appeal for Manitoba was also dismissed. The appellant has now, with the leave of the Court of Appeal, appealed to His Majesty in Council.

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The appellant entered the service of the railway company in June, 1920, having a few days before arrived in Canada from England. He left its employ on June 13, 1927, pursuant to a notice dated June 9, 1927, in the following terms: " Your services will not be required after 5 P.M. on June 13, 1927, on account of reduction of staff."

The appellant's claim that this notice operated as a wrongful dismissal was founded upon the allegations: (1.) that the railway company was bound contractually to him not to reduce staff by dismissing him while retaining in its service men junior to him, (2.) that men junior to him had been retained, and (3.) that his " seniority rights " had thereby been violated.

A considerable number of other points were raised, and some of them were argued before the Board; but all are, in their Lordships' view, subsidiary to the question, whether or not the railway company had bound itself to the appellant in the manner indicated. If in truth there was no such contractual obligation between the parties to this action, none of the other questions call for consideration or decision.

According to the evidence, all that passed when the appellant was engaged was this: The appellant saw a Mr. Hough and signed a form of application for employment. He was told to start the following morning. He then asked what wages he was going to receive. " Hough's reply was I would receive the going rate, the machinist's rate." There was no written agreement between the appellant and the railway company. It is evident that the suggested contractual obligation is not capable of being established merely from what happened on that occasion.

The appellant, however, in support of his claim relies on other matters, to which reference must now be made.

There was in existence a document dated November 12, 1919, called Wage Agreement No. 4. The parties to it were, on the one hand the Canadian Railway War Board, on the other hand a body called Division No. 4, Railway Employees' Department, American Federation of Labour. The document describes itself as an agreement " in respect to rates of pay,

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work hours, and conditions of service for employees in the locomotive and car department of the several railways as specified herein": it further states "This agreement shall be effective on the following railways": the railway company being included under Canadian National Railways. Then follow "rules" to the number of 188.

At the date of this agreement, the Canadian War Board represented the railways of Canada, and when the War Board, in course of time, ceased to exist, the railways of Canada had as their representative in negotiations with representatives of the men, a voluntary association called the Railway Association of Canada. Division No. 4, Railway Employees' Department, American Federation of Labour (hereinafter called "Division No. 4"), was a territorial division of a labour organization, whose headquarters were in the United States. Division No. 4 covered the whole of Canada.

At different times variations of the Wage Agreement No. 4 were agreed to between the Railway Association of Canada and Division No. 4, but for the purposes of this appeal these variations are not material, and Wage Agreement No. 4 need alone be considered.

The appellant alleges that the railway company was contractually bound to him in the terms of Wage Agreement No. 4, and that his dismissal was made in such circumstances that it amounted to a breach by the railway company of certain provisions of Wage Agreement No. 4, more particularly rules 27, 31, 35, 36 and 37, which he says secured to him his seniority rights and other rights. It does not appear to their Lordships necessary to discuss the question whether the railway company in dismissing the appellant did or did not act in violation of those provisions. For the purposes of this appeal they are prepared to assume this point in the appellant's favour, and to consider this appeal upon the footing that the railway company did, in dismissing the appellant, act in violation of the provisions of Wage Agreement No. 4, assuming them to apply.

The outstanding question for decision is whether the railway company was contractually bound to the appellant in the terms of Wage Agreement No. 4, i.e., whether the contract subsisting between the appellant and the railway company included provisions similar to the provisions of Wage Agreement No. 4. Unless that position can be established the appellant is not in a position to sue the railway company for any alleged breach of those provisions.

The trial judge dismissed the appellant's action upon the ground that, because he was not a member of Division No. 4, he could not claim the benefit of Wage Agreement No. 4.

In the Court of Appeal a variety of opinions combined to defeat the appellant.

Fullerton J.A. (with whom the Chief Justice of Manitoba and Dennistoun J.A. concurred) held that there was no evidence to show that the appellant agreed to work under the conditions fixed by Wage Agreement No. 4, and that any such agreement, if proved, would be unenforceable for want of mutuality.

Trueman J.A. held that the appellant was entitled to enforce against the railway company the provisions of Wage Agreement No. 4, but that under those provisions he had no right at the date of his writ to resort to the law Courts.

Robson J.A. assumed, without deciding the point, that the appellant could enforce against the railway company the provisions of Wage Agreement No. 4. Upon that assumption, he agreed with Trueman J.A. that the appellant had appealed to the wrong tribunal.

Their Lordships feel a doubt whether the true question has really been considered by all the learned judges in the Courts below—namely, whether the appellant has established that the contract for service which existed between himself and the railway company included terms by which the railway company either bound itself to the appellant to observe the provisions of Wage Agreement No. 4, or bound itself to the appellant to observe provisions similar to those contained therein.

If that question be answered in the affirmative, it is immaterial whether the appellant was or was not a member of Division No. 4 or of any other or of no labour organization.

Further, if that question be answered in the affirmative, there can be no question of the contract being unenforceable for want of mutuality or otherwise. It is simply a contract of employment which embodies special terms. On the other hand, if the question be answered in the negative, the action, so far as it depends upon the existence of that contractual obligation on the part of the railway company, must of necessity fail, and no further question can arise.

Before their Lordships' Board the appellant's counsel sought to establish the existence of the necessary contractual obligation from the following facts which, as he claimed, the evidence proved: That the railway company (whose shops were open shops) treated all its employees alike, whether members of Division No. 4 or not; that when the appellant was hired he was promised "the going rate" and was placed as regards salary under "schedule," which meant the Wage Agreement No. 4; that he was placed on the seniority list referred to in rule 31; that when he was dismissed the railway company gave him the number of days' notice required by rule 27; that when he complained to various officials of the railway company he was referred to the committee, as provided by rule 35. From these facts their Lordships were invited to hold that the necessary contractual obligation had been established.

There can be no doubt upon the evidence that in fact, the provisions of Wage Agreement No. 4 were applied by the railway company to all its employees in its locomotive and car department. One extract from the evidence of the general manager (Mr. Tisdale) makes this clear: "(A.) I understand your question to be this: Is the agreement that was negotiated between the railway companies and Division 4 applicable to all the men in the shop? (Q.) Yes? (A.) The answer is Yes."

Their Lordships, however, are unable to treat these matters as establishing contractual liability by the railway company to the appellant. The fact that the railway company applied the agreement to the appellant, is equally consistent with the view that it did so, not because it was bound contractually to apply it to him, but because as a matter of policy it deemed it expedient to apply it to all.

If the conduct of the railway company in applying the provisions of the agreement to the appellant could be explained only by the existence of a contractual obligation to the appellant so to do, it would be not only permissible, but necessary to hold that the existence of the contractual obligation had been established. In the circumstances, however, of the present case, their Lordships find themselves unable so to decide.

But the matter does not quite rest there. When Wage Agreement No. 4 is examined, it does not appear to their Lordships to be a document adapted for conversion into or incorporation with a service agreement, so as to entitle master and servant to enforce inter se the terms thereof. It consists of some 188 "rules," which the railway companies contract with Division No. 4 to observe. It appears to their Lordships to be intended merely to operate as an agreement between a body of employers and a labour organization by which the employers undertake that as regards their workmen, certain rules beneficial to the workmen shall be observed. By itself it constitutes no contract between any individual employee and the company which employs him. If an employer refused to observe the rules, the effective sequel would be, not an action by any employee, not even an action by Division No. 4 against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied.

If, in the present case, the appellant has suffered any injustice at the hands of the railway company, it was in the power of Division No. 4 to obtain justice for him had they chosen so to do. It is suggested that Division No. 4 chose not so to do, because the appellant was a member of a rival organization. Assuming the suggestion to be well founded, the moral thereby pointed would appear to be that in the case of an "open" shop, the protection which an agreement such as Wage Agreement No. 4 affords to a workman who is not a member of the contracting labour organization, is

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to be measured by the willingness of that body to enforce it on his behalf.

One more observation remains to be made. Their Lordships have dealt with the case as one in which the wrongfulness of the dismissal depended solely upon the alleged violation of provisions contained in Wage Agreement No. 4. No foundation was laid by the evidence for any claim for damages upon the footing that the length of notice given was insufficient under the actual contract of service which existed between the appellant and the railway company.

In the result their Lordships are of opinion that this appeal should fail and be dismissed with costs; as they have already humbly advised His Majesty.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Freshfields, Leese & Munns.*

[HOUSE OF LORDS.]

H. L. (Sc.)*
1930
Nov. 24.

WILLIAM LEITCH AND COMPANY, LIMITED . . . . APPELLANTS;

AND

LEYDON . . . . RESPONDENT.

A. G. BARR AND COMPANY, LIMITED . APPELLANTS;

AND

MACGEOGHEGAN . . . . RESPONDENT.

WILLIAM LEITCH AND COMPANY, LIMITED *v.* LEYDON.

Interdict—Movable Property—Invasion of proprietary Rights—Property in Aerated Water Bottles—Participation in alleged illegal Use of Property.

The appellants, a firm of mineral water manufacturers, sold mineral waters to retailers in bottles embossed with their name on the terms that the bottles remained the property of the appellants, and required their customers to pay a deposit of 1*d.* per bottle to secure the return of their bottles. The respondent, a grocer, installed on his premises a soda fountain, from which he filled empty mineral water bottles and other receptacles tendered to him by members of the public with various aerated beverages. Among the bottles so filled were some embossed with the appellants' name. The respondent was not a customer of the appellants. The appellants having intimated to the respondent that his user of their bottles was an infringement of their right of property in the bottles, and the respondent having ignored this intimation, the appellants sought interdict against his user of their bottles:—

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* Present: VISCOUNT HAILSHAM, VISCOUNT DUNEDIN, LORD BUCKMASTER, LORD BLANESBURGH, and LORD WARRINGTON OF CLYFFE.

Held, *pace* Lord Blanesburgh, that, assuming the property in the bottles remained in the appellants, the respondent owed no duty to the appellants before filling the bottles to examine them or inquire into their history, and that the appellants were not entitled to interdict.

Decision of the First Division of the Court of Session in Scotland 1930 S. C. 41 affirmed.

APPEAL against an interlocutor of the First Division of the Court of Session in Scotland and an interlocutor of the Lord Ordinary (Lord Pitman) in an action of suspension and interdict in which the appellants were complainers.

The facts are fully stated in the opinion of Lord Hailsham and are summarized in the headnote. The Lord Ordinary refused interdict and the First Division, by a majority (the Lord President, Lord Sands and Lord Morison; Lord Blackburn dissenting) adhered to his interlocutor.

1930. Oct. 20, 21. *James Keith K.C.* (with him *J. L. Clyde*) (both of the Scottish Bar) for the appellants. The appellants have retained a right of property in their bottles and have done nothing to bar themselves from asserting that right, and they are therefore entitled to restrain the unauthorized use of the bottles by the respondent. The appellants' case against the respondent depends upon their right of property in the bottles. An unauthorized use of the bottles, however innocent, is a trespass on their property. The respondent commits a trespass on the appellants' property the moment he has the bottle in his hand and does something to their property to which he knows they object; he is misusing or participating in misusing the appellants' property, and, if he claims a right to do so, the appellants are entitled to interdict: *Wilson* v. *Shepherd* (1);

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(1) 1913 S. C. 300, 304.

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A. G. Barr & Co. v. *Mair & Dougall* (1); *Cantrell & Cochrane, Ld.* v. *Neeson* (2); *Barlow & Co.* v. *Hanslip.* (3)

Condie Sandeman D.F., *Sir Leslie Scott K.C.* (of the English Bar) and *J. G. M'Intyre* (of the Scottish Bar) for the respondent were not called upon.

The House took time for consideration.

VISCOUNT HAILSHAM (read by LORD THANKERTON). My Lords, the appellants in this case are manufacturers of aerated waters and members of an association called the Edinburgh and District Aerated Water Manufacturers' and Beer Bottlers' Defence Association. The respondent is a grocer carrying on business in Edinburgh. By their note of suspension and interdict dated January 6, 1928, the appellants seek to interdict the respondent: (1.) from receiving or accepting from his customers bottles belonging to the appellants, and embossed, moulded, engraved, or otherwise impressed or marked with the appellants' name for the purpose of filling the same with soda water, lemonade, kola, raspberry, or other aerated water or beverage sold to his said customers, and drawn from or made by means of or with the aid of a Vantas soda fountain or other soda water fountain or similar device containing or producing or aiding in the production of soda water, lemonade, kola, raspberry, or other aerated water or beverage not of the appellants' manufacture; (2.) from filling with soda water, lemonade, kola, raspberry, or other aerated water or beverage drawn from or made by means of or with the aid of a Vantas soda water fountain or other soda water fountain or similar device as aforesaid bottles belonging to the appellants, and embossed, moulded, engraved, or otherwise impressed or marked with the appellants' name, for the purpose of selling the contents thereof to his customers, or of enabling his customers to remove the contents thereof when sold from his said shop or other premises.

(1) (1904) 21 R. P. C. 665, 669.
(2) [1926] N. I. 107.
(3) [1926] N. I. 113n.

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On April 12, 1929, the Lord Ordinary pronounced an interlocutor in these terms: "The Lord Ordinary, having considered the cause, sustains the fifth plea in law for the respondent and assoilzies him from the conclusions of the note of suspension and interdict by the complainers, and decerns."

On November 15, 1929, the First Division of the Court of Session adhered to the said interlocutor and refused the reclaiming note of the appellants.

The fifth plea in law referred to in the interlocutor was in the following terms: "Assuming that the property in the said bottles remained in the complainers, the respondent, before filling the said bottles, owed no duty to the complainers to examine them or enquire into their history, and should be assoilzied."

The facts which give rise to the present appeal are as follows:—

The appellants carry on a considerable business in Edinburgh as manufacturers of aerated waters. In the manufacture of aerated waters the cost of the bottles or other containers in which the aerated waters are supplied substantially exceeds the value of the aerated waters themselves, and the appellants and other manufacturers are anxious, therefore, to secure that, as far as possible, their bottles should return to them after the contents have been consumed. The bottles used by the appellants contain their name embossed or moulded into the glass, and are closed by stoppers which are covered by a strip label bearing the appellants' name and also in some cases statements that "this bottle is not sold with its contents. It remains our exclusive property"; in others the words, "Replace stopper," and in others various combinations of these or similar statements.

In or about the year 1907 the appellants and those associated with them in the Edinburgh and District Aerated Water Manufacturers' and Beer Bottlers' Defence Association adopted a scheme under which their customers were required to make a deposit of ½*d.* (later increased to 1*d.*) on each bottle and of 6*d.* on each syphon; and at the same time they set up a bottle exchange to which any bottle which any member of the association received belonging to any other member was returned, and which acted as a clearing-house among the different members of the association for bottles. After this scheme had been adopted the course of business between the appellants and their customers was as follows:—

In the case of credit customers, when goods were delivered invoices were sent out which contained the following notice: "All syphons, bottles, stoppers, and boxes bearing our name remain our exclusive property. They are provided for the purposes of our own trade only and must not otherwise be used, unduly detained, damaged, or destroyed. To ensure their return a deposit of 6*s.* per doz. will be made on all syphons and 1*s.* per dozen on all bottles sent out. Our syphons and bottles are not sold with their contents and must be returned when empty, whereupon the deposit will be refunded."

A notice in the same terms appeared on the monthly accounts rendered to customers, and in these accounts the customer was debited with the prescribed deposit on all goods supplied and was credited with the 6*s.* per dozen on syphons and 1*s.* per dozen on bottles returned empty, whether the syphons and bottles were the property of the appellants or of any other manufacturer.

In the case of sales for cash, the business was mainly done through vanmen who called on the customers and delivered the goods for cash. In the case of these cash transactions the vanmen were instructed to inform the customers that the bottles remained the property of the vendors; he was to collect a deposit on syphons and bottles and was to give credit for any empty syphons or bottles returned to him. Three such vanmen were called, who stated that it was their practice to give notice to the customers in accordance with these instructions. The appellants did not deal directly with the public. When the appellants' customers resold to the public it appears to have been their practice in some cases not to exact a deposit but to trust to the customers to return the bottles or syphons, and in other cases to ask a deposit of 1*d.*

on bottles and 6*d.* on syphons, which was returned to the customer if and when the empty bottles and syphons were handed back. In practice the great bulk of the appellants' bottles did return to them sooner or later directly from customers or indirectly through the bottle exchange; the appellants proved that on an average about 1.62 per cent. of their bottles failed to return, representing about 22,000 bottles a year. The appellants' association seemed to have been at considerable pains to make their method of business with regard to bottles and syphons widely known to the public; notices were supplied to their customers with a request that they should be displayed in their shops; advertisements were inserted in the newspapers and exhibited in tramcars and elsewhere. The amount of the deposit was not nearly sufficient to cover the value of the bottle or syphon, but in practice it does not appear that any steps were taken by the appellants to compel delivery of any bottles or syphons not returned, or to assert any claim for the value of such bottles or syphons beyond the amount of the deposit.

The respondent dealt in aerated waters which he obtained from the firm of Dunbar & Co., who were members of the Edinburgh and District Aerated Water Manufacturers' and Beer Bottlers' Defence Association. In addition to these bottled waters the respondent, about five years ago, installed in his shop a Vantas soda fountain. This was obtained from a company known as Sodastream, Ld. The object of the installation of the Vantas soda fountain was to supply aerated waters in small quantities to customers bringing their own receptacles. The method of business was for the customer to come with a bottle or jug or any other receptacle and to ask for whatever kind of aerated water he desired. The shopkeeper then put into the receptacle the proper quantity of flavouring matter and added the proper quantity of aerated water from the fountain and returned the receptacle full to the customer; in some cases the contents were consumed on the premises and in others they were taken away in the customer's bottle or jug. In the respondent's case about half the receptacles brought by customers were jugs or similar open vessels and about half were bottles which could be closed up. The respondent made no inquiry of his customers as to their ownership of the receptacle provided, and made no examination of the receptacle beyond seeing that it was sufficiently clean to receive the drink. On July 29, 1927, the Edinburgh and District Aerated Water Manufacturers' and Beer Bottlers' Defence Association addressed to the respondent a letter in the following terms:—

"Dear Sir,—It has been reported to me that you have recently been filling aerated water bottles belonging to members of this association with beverages from the soda fountain installed in your shop. This is an infringement of the right of property of the members in their bottles. Members do not part with the property in their bottles, and no one other than the member whose name is on the bottle has a right to use it. I enclose a list of the members' names and enclose hereto a form of undertaking which you might write out on your own paper and return to me. Otherwise the association will have to take further steps to ensure the adequate protection of their members' property."

With this letter was enclosed a list of the names and addresses of the members of the association, including the appellants. The respondent made no reply to the letter. For some little time after its receipt he seems to have examined the bottles produced to him by his customers and to have refused to fill those bearing the names of members of the association. Later on, however, he received from Sodastream, Ld., a letter which stated (inter alia): "There is no law to prevent your drawing Vantas drinks into any bottles handed to you for this purpose and our advice to you is to take no notice of threatening letters. If, as a result of following this advice, you are put to the expense of defending an action at law, we will bear the cost." After receipt of this letter the respondent seems to have filled bottles which were produced to him without examining them or taking any steps to ascertain the names upon them; and evidence was adduced at the trial that persons sent by the bottle exchange of the appellants' association with bottles belonging either to the appellants or to Dunbar & Co. were able to get those bottles filled on five or six occasions by the respondent. It was not suggested that these emissaries ever called the attention of the respondent to the names on the bottles ; there was some evidence that on one occasion in September, 1928, the person serving the drink noticed the appellants' name on the bottle, but this statement was not admitted by the respondent. It was admitted by the respondent, in evidence, that if the bottle was clean it was possible by examination to ascertain whether it bore the name of the appellants or of some other manufacturers. The evidence on this point is in these terms :

(Q.) It was quite easy for your assistants to see if the bottles belonged to Leitch ?—(A.) Oh, yes, we were not very particular. (Q.) Or to any other aerated water manufacturer ?—(A.) Yes. (Q.) It would be seen at once when you took it up in your hand ?—(A.) Well, you never paid any attention to it as long as the bottle was clean. (Q.) It was easily seen that it was Leitch's bottle ?—(A.) No, not unless you looked. (Q.) One glance would tell you ?—(A.) Yes, if you paid attention to it, it would. (Q.) And if you were handling it, would not you see it when you were filling it with soda ?—(A.) No, the bottle is below. (Q.) When you took it from the counter ?—(A.) Yes, you may notice it. (Q.) In filling them have you noticed the names on the bottles which you were filling ?—(A.) Well, I have answered that already. Yes, occasionally, if you will look for it you will see the name on the bottle surely.

In this state of facts the appellants contend that there was a duty upon the respondent to refrain after receipt of the letter of July 29, 1927, from using or assisting his customers to use any bottles that belonged to the appellants. Counsel for the appellants conceded that unless they could prove that all bottles having the appellants' name embossed upon them were the property of the appellants their action must fail ; but they claimed that they had established this fact, and they contended that if that fact were established they had a right to insist that the respondent should examine the bottles

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tendered to him for filling and should refrain from filling them if they bore the appellants' name.

My Lords, in my judgment there is no foundation in law for this contention. It is conceded that there is no contractual relationship between appellants and the respondent, and the duty must arise, if at all, from the fact that the bottles are the property of the appellants. I cannot see that the fact that these bottles belonged to the appellants gives them any right to insist on persons with whom they are in no contractual relationship examining the bottles tendered to them in the course of their trade in order to be sure that they are not bottles belonging to the appellants and being used for purposes to which the appellants object. Counsel for the appellants conceded that unless he could establish that all bottles bearing their name were the property of the appellants his claim must fail, and that he could not impose upon the respondent the duty of investigation to find out whether any particular bottle belonged to the appellants or not; but he contended that there was a duty to examine the bottles, and he sought to justify that claim by saying that it was very easy to make the examination. I do not understand on what legal foundation this distinction rests. Unless the appellants can establish that there is a duty on the respondent to ascertain which bottles are the appellants' property it seems to me that their claim for an interdict must fail; if there is such a duty, then I do not see that it could make any difference in law whether the ascertainment is easy or difficult. In my judgment no such duty can be shown to exist, and therefore the action must fail. This is the ground on which the dismissal of the action is based in the Court of first instance, and it is sufficient to dispose of the case.

The Lord Ordinary and some at least of the judges in the First Division seem to have thought that the evidence did not establish that all bottles bearing the appellants' name must remain their property. The Lord Ordinary took the view that the evidence of the vanmen was not inconsistent with some, at least, of the appellants' customers having purchased the bottles with their contents from the vanmen who had ostensible authority to effect such a sale. During the course of the argument before your Lordships' House other possible means by which the property might have passed from the appellants in certain cases were suggested. I am not disposed to dissent from the Courts below on their view of the evidence, but it seems to me unnecessary for the purposes of the decision of this case. Interesting and difficult questions were also raised in the argument as to whether what the respondent did amounted to any user of the bottles by himself or whether he was merely assisting his customers to use them, and as to whether in the latter case he could be restrained from assisting his customers to make use of bottles which were in their lawful possession, for a purpose which was not wrongful or unlawful on the part of the customers unless they had notice that the appellants objected to it. These questions again do not seem to me necessary for the determination of the case on the view which I have formed; and I think it better, therefore, to refrain from any discussion of them, especially in view of the fact that your Lordships do not think it necessary to hear counsel for the respondent. For the reason which I have given I think that the interlocutor pronounced was correct and that this appeal should be dismissed with costs.

Lord Buckmaster. My Lords, the appellants are manufacturers of aerated waters which they sell to traders and others in bottles and syphons, the terms of the sale being that the property in the bottles and syphons remains with the appellants, to whom their immediate customers are bound to restore them. In respect of the bottles, with which alone we are concerned, a penny, part of the purchase price, is returned upon their receipt.

As between the appellants and their immediate customers, therefore, the position is quite plain. But the customers are, and must be, to the knowledge of the appellants, in the habit of reselling the soda water in bottles to any one who seeks to buy, and the bottles may in such cases be taken away. It is undoubtedly the fact that if any purchaser takes away a

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bottle he has to pay the trader 1*d*., which is returned if the bottle is sent back; but the evidence is clear, and in accordance with common experience, that such ultimate purchaser becomes apparently the absolute owner of the bottle, and can put it to any of the uses mentioned by Lord Sands, or to any others which ingenuity may suggest. As between the appellants and such a purchaser the appellants say that they still remain the owners of the bottle. This I will assume without deciding it. Letting that matter pass and coming to the facts of this case we find that in certain cases the purchasers of these bottles, having emptied them of their original contents, seek to have them refilled, which they can do by a simple process at the shop of any one who possesses a machine similar to that possessed by the respondent. The appellants seek to restrain the respondent from using his machine for any such purpose. They assert that in the hands of the ultimate purchaser there is no right whatever to use the bottle for any purpose at all. He may have taken it away on a journey, not know to whom it should be returned, and be unaware of the elaborate clearing-house in the vortex of which nearly all the empty bottles ultimately find their way, but still the bottle is not his, and even while in his lawful custody cannot, when once empty, ever be refilled. Assuming, however, that the appellants can claim from any purchaser of the bottle the restoration of the bottle and forbid him using it for any purpose at all, it still does not follow that they are entitled to obtain the interdict they seek against the respondent.

The respondent does no more than fill whatever receptacle is offered to him. He is wholly unaffected by any contract made between the appellants and their customers. Even if the purchaser is doing an unlawful act in bringing the bottle to be filled, the appellants cannot cast upon the respondent the duty of investigating every vessel for the purpose of seeing whether it is one of the appellants' bottles. It is true that the names are embossed upon the bottles and the ownership stated on some but not all of the labels, but the labels may be destroyed, as they probably would be; so that if

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the appellants are right, the respondent is bound to inspect and to compel every one of his assistants to inspect each bottle brought, before he refills it, for the purpose of seeing, in the words of the interdict the appellants seek, whether it is "embossed, moulded, engraved, or otherwise impressed or marked" with the appellants' name. No authority has been quoted to show that any such duty can be cast upon a stranger to the original contract; and indeed an interdict, in order to be effective, would in the result be an interdict compelling the respondent to examine the bottle, because there are other bottles in numbers which do not belong to the appellants, though they may belong to other people similarly circumstanced; and unless such a duty were established by precedent, or reasonably to be inferred from well known and accepted obligations, I should be unwilling to create it anew.

For this reason, therefore, I think that the appeal must fail; but I should like to add that, had I reached a different conclusion upon the facts as stated, there would still remain, to my mind, the difficult question whether, when the appellants parted with the possession of these bottles on terms which they must be assumed to know would not be made binding on the ultimate purchaser, and clothed their customer with the full apparent power of making a good title to the bottle, they could afterwards seek assistance by interdict for an alleged wrong from the responsibility of which their own conduct was not entirely free.

VISCOUNT DUNEDIN. My Lords, I concur. What is that which is demanded from the respondent if the interdict sought were granted? He would be obliged, when a customer called and, proffering a bottle, requested it to be filled from the Vantas soda fountain, to inspect the bottle, and if he found an embossed name on it, to certiorate himself whether the name was not the name of one of the numerous members of the Association of Aerated Water Manufacturers, and if he found it was, then to refuse to supply the Vantas water demanded—a refusal which would probably lose him his customer. Such a demand can only be granted if there is a clear case of infringement of a right of the appellant by the respondent.

Now, the person who presents the bottle to be filled is in lawful possession of the bottle; that possession is not transferred to the respondent. The person in lawful possession requests the bottle to be filled, and it is filled ; the filling is all that the respondent does. It is quite true that the person presenting the bottle may be, and that to the respondent's knowledge, under contractual obligation to the appellant either as to its return or its use ; but to that contract the respondent is no party, and it is a novelty to me to say that A. can be compelled by law to do or refrain from doing something lawful in itself, and that to his own prejudice, in order to help B. to enforce his contract with C. No case of that sort was produced. It would be a perfectly different matter if the respondent in any way asserted property in the bottle or acted in such a way that it could be said that he was passing off his Vantas aerated water as the aerated water of the appellants. He is doing nothing of the sort; nor is he damaging an article which he knows to be not his own. He is only complying with the request of the person who is in lawful possession of the movable to give something which that person uses in a way connected with that movable. The appellants can sue their customer for breach of contract and either get such damage as they can qualify or get an interdict against his breaking his contract, but they have no contractual relation with the respondent on which they can sue, and they can, in my opinion, qualify no culpa on his part.

My Lords, I have perused the opinion of my noble and learned friend Lord Blanesburgh, which will shortly be read to your Lordships, and I find it necessary to say this : Although I think it is quite true that the general considerations on which this case falls to be determined are the same in Scotch and English law, it is quite a different thing to say that Scotch and English law is so much the same that you can quote cases as quoted by my noble and learned friend—the older authorities on trover and conversion—and make them Scotch authorities. The law of England as to trover and conversion is, in many senses, a very technical law, and it is largely put aside now in modern times; but those older authorities go very technically upon English distinctions. Trespass as to a chattel in a Scotch lawyer's mouth is a perfectly unmeaning phrase, and accordingly I cannot think that the authorities quoted by my noble and learned friend have anything to do in a Scotch case with the question of sustaining the fifth plea in law.

I think the Court of Session was right in refusing the interdict.

LORD BLANESBURGH (read by LORD TOMLIN). My Lords I concur in the view that this appeal may properly be dismissed without asking any assistance from the respondent's counsel. But that concurrence I give for a special reason, which I will explain later. If it had seemed to me to involve the acceptance on my part of the respondent's fifth plea in law, as interpreted by the Lord Ordinary, I should, I fear, have felt myself bound *in hoc statu* to withhold it.

It is, I think, unfortunate that in no Court has reference been made to a judgment of Parke B.'s which, delivered eighty-five years ago, illuminates to-day many dark places in this case. I have come upon it in the course of some examination of the authorities made since the close of the argument, and I take leave to refer to it—English authority though it be—because I have not noted in the proceedings in the Court of Session that any distinction was taken there between the principles of Scots and of English law applicable to this case. Authorities in both countries were quoted indifferently. I do not, however, put Parke B.'s judgment forward as an authority which even provisionally must in any of its aspects be said to be decisive of this appeal. The facts in many respects are different. The wrongful act of the defendant there, for instance, amounted to a conversion; while the alleged wrongful acts of the respondent here probably at the highest amounted to no more than a trespass to goods. But the decision is relevant, because each of these torts is based upon the proposition that a man touches the property of others at his peril, and it is for that reason that the decision, and, even more, the grounds of it, are so instructive now. They must, as it seems to me, be most seriously weighed before any approval of the fifth plea in law here can be expressed.

Parke B.'s case is *Manders* v. *Williams.* (1) It has found its way into the text-books, and into subsequent judicial decisions. It was an action of trover for certain casks containing porter which had been consigned by the plaintiffs, brewers in Dublin, to one John David of Langhorne in Wales under an invoice which contained the following clause : " The empty casks to be returned to Dublin at his [David's] expense and risk within six months from date hereof, or paid for at invoice price, at the option of the shippers." The invoice then stated the price of the porter, and there was this note at the foot : " Value of the barrels 7*s.* 6*d.* each." The defendant was the High Sheriff of Carmarthenshire, who had seized and sold, under a fi. fa. against David, 300 of the casks lying empty in his cellar. The question was whether the plaintiffs had sufficient possession to maintain trover against the Sheriff.

It will be noticed that the terms of the invoice there were much less express than are those of the invoices with which we are here concerned. But the learned judges took a view of the document which in essentials brings it into correspondence with the express provisions of the appellants' invoices. The Court's interpretation of the invoice is to be found in the following observations of Alderson B. and Platt B. in the course of the argument, and in the judgment of Parke B. at its close. (1)

" There is no event," said Alderson B., " in which David could say to the plaintiffs 'I will have the casks.' The meaning of the contract is, that the moment the casks are empty they belong to the shippers of the porter ; but if David did not return them within six months, they were to have the option of treating him as a purchaser."

" The true construction of the contract," said Platt B., " is that the brewers sell the porter and lend the casks until it is consumed."

(1) (1849) 4 Ex. 339, 340, 342, 343.

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But the position is most clearly exposed in the judgment of the Court, in the course of which Parke B. says: "The contract must be construed with reference to the course of trading between the parties. . . . The object was, to put the vendee in possession of the porter, and he was to have the casks for keeping the porter until he had an opportunity of disposing of it. Then what was his situation as soon as the porter was emptied from the casks? Was he more than a mere bailee during pleasure, the plaintiffs having a right to say 'You have no longer any claim to the possession of the casks: that was determined when they were emptied, and we insist upon their being delivered to us.' That being so, the plaintiffs are entitled to maintain trover against a stranger who seizes the casks, and the sheriff is in that position. The true construction of the contract is to give David an interest only until the casks were empty. . . . The interest of the vendee was never meant to extend beyond the right to keep the casks until the porter was consumed. Possibly, he might within the six months have transferred the porter in the casks to a sub-vendee, but, as soon as the casks were emptied, the right to them reverted to the vendors. According to the true construction of this contract, I am satisfied that it was never intended that David should have the casks for any other purpose than keeping the porter. Indeed, I do not see what advantage there could be in his right of possession continuing after the casks were empty; for, during the residue of the six months, he could neither let them to any one else nor make any further use of them himself, without being a wrongdoer, and at the end of the six months he was bound to return them. So soon as the casks were empty, the right of property and the right of possession reverted to the plaintiffs, and David was in the situation of a mere bailee during pleasure."

My Lords, the fifth plea in law assumes the property in the appellants' invoiced bottles to remain in them. This judgment in *Manders* v. *Williams* (1), I venture to think, shows that to be a very necessary assumption. It shows that in

(1) 4 Ex. 339.

such cases as the present the manufacturers' customers may be no more than mere bailees of the invoiced bottles entitled to retain them until they are empty, but precluded, *save as wrongdoers*, from making any further use of them while in their custody. It shows also how the customer may be relegated to that position by an invoice much less express than the appellants' invoices here. It shows, further, that those described as sub-vendees of the customer—the ultimate consumers of the appellants' aerated waters here—hold the chattels under the same restricted title as did the customer, whatever may have been their arrangement with him. But this statement, I think, must be subject to this exception—that the "consumer," having made no contract with the manufacturers, cannot be placed, as was their original customer, under a positive obligation to return to the manufacturers their bottles when empty. No one, I take it, is bound, save by contract, to take a chattel to the owner of it. His obligation in that behalf is not to prevent the owner getting it when he comes for it.

There was, it will be noted, no deposit in that case. But the appellants contend that *Barlow & Co.* v. *Hanslip* (1) rightly shows that the situation in law is not thereby affected in principle although tender of 1*d*. per bottle would possibly in this case have to accompany each demand.

My Lords, the argument of the appellants fortified by *Manders* v. *Williams* (2) may, I think, be summarized as follows. I state it only as an argument without indicating upon it any opinion of my own.

The respondent here, in relation to bottles in respect of which the appellants' ownership is assumed, has been guilty of a trespass. The wrong to the appellants in relation to that trespass is constituted whether or not actual damage has resulted therefrom either to the chattel or to themselves: see Pollock on Torts, 13th ed., p. 364. But a trespass committed by the respondent, "not acting," in the words of the Lord President, "on behalf of his customers but for the purposes of his own trade" and instigated by rival

(1) [1926] N. I. 113n. (2) 4 Ex. 339.

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manufacturers who have assumed the burden of his defence, will be strictly regarded by the Court, and while not, if isolated casual or unpremeditated, a fit subject of interdict, readily becomes one if it is committed by the wrongdoer under an alleged claim of right to fill the bottles, whether the bottles are, or whether he knows them to be, the property of the appellants or not. The gist of the case against the respondent is, it is contended, in the words of Cleasby B. (*Fowler* v. *Hollins* (1)), " that persons deal with the property in chattels or exercise acts of ownership over them at their peril " ; they at least know that the bottles are not their own, and such acts are as wrongful if exercised on request or by direction of some one other than the owner as if exercised on the respondent's own behalf. The trespasser is not excused by inquiry into the complainant's title except to the extent that ignorance, after inquiry, may be evidence that the act was inadvertent. But knowledge of the pursuer's title, while it may be an aggravation of the trespass, is no constituent part of it.

In *Stephens* v. *Elwall* (2) Lord Ellenborough says : " The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master ; but nevertheless his acts may amount to a conversion ; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it." Of that case, which was finally approved of by this House in *Hollins* v. *Fowler* (3), Blackburn J. says : " No case harder than that of the defendant in *Stephens* v. *Elwall* (2) can well be imagined, unless, perhaps, that of a sheriff who seized the goods which, in consequence of a secret act of bankruptcy, had become the goods of the assignees. He was liable to them in trover : see *Garland* v. *Carlisle*. (4) . . . . Those who agree with the opinion expressed by the Lord Chief Baron that it is unreasonable and unjust that [persons in the position of the defendants] should be bound, at their peril, to enquire into the title of the sellers with whom they deal, would support an alteration of the law to that effect. Many, having regard to the interest of the true owners of goods, would object to it."

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(1) (1872) L. R. 7 Q. B. 616, 639; affirmed (1875) L. R. 7 H. L. 757.

(2) (1815) 4 M. & S. 259, 261.

(3) L. R. 7 H. L. 757, 769.

(4) (1837) 4 Cl. & Fin. 693.

The law, such is the appellants' contention, is the same in all these respects where a defender has wrongfully trespassed upon goods as where he has wrongfully converted them; while, with reference to Blackburn J.'s last observation, there might well be serious objection on the part of the public as a whole to any alteration of the law in its application to a case like the present, seeing that the protection of the appellants' property in their bottles, so far as it is effective, facilitates the supply of soda water broadcast throughout the country at minima of expense in respect of overhead charges to the manufacturer and of corresponding cost to the consumer.

My Lords, I do not yet accept these contentions, because your Lordships have not heard the respondent. They may have less force in Scotland than in England. They may finally be found, in some other case perhaps, to have no force at all. But while I do not yet accept them, neither do I now reject them. They call for an answer, and until that is forthcoming my mind remains open. Therefore I cannot for myself accept, as established *in hoc statu*, the respondent's fifth plea in law.

But nevertheless I am of the opinion with the rest of your Lordships that this appeal should be dismissed, and for the reason that the appellants have not, in my judgment, established as against the respondent any actionable wrong. The fifth plea in law has been assumed to imply trespass, but there has, in fact, been no case of trespass upon their goods proved by the appellants against the respondent. It is true that the property in the empty bottles presented to and filled by the respondent was indubitably in the appellants, but it is equally true that the requests to fill them made to the respondent were made on the authority and instructions of the appellants and with the desire that they should be acceded to. Of what trespass then, it may be asked, was the respondent guilty when he deferred so readily to all the proved requests? In my judgment he was, as it happened, guilty of no trespass whatever. "Volenti non fit injuria." It may be that, in view of the nature of the wrong complained of in cases like this, it can never be possible to prove that it has been committed by resorting to anything in the nature of a trap order. It suffices, however, to say that the appellants in this case have not, as I think, supplied the necessary proof of trespass in any instance by the respondent.

For that reason only I concur in the motion made by the noble Viscount on the Woolsack.

Lord Warrington of Clyffe. My Lords, this is an appeal by the complainers in the action from an interlocutor dated November 15, 1929, of the First Division of the Court of Session whereby their Lordships (*diss.* Lord Blackburn) dismissed a reclaiming note against an interlocutor dated April 12, 1929, pronounced by the Lord Ordinary (Lord Pitman) whereby an interdict claimed by the complainers was in effect refused.

The complainers are manufacturers of aerated waters, having a factory in Edinburgh. Their waters are sold in bottles marked and embossed with their name and address, and closed with a screw stopper also marked with their name, and in some cases bearing a paper label stating in effect that the bottle is their property.

The appellants deal only with retailers, who sell the waters to the public. They do not deal direct with members of the public.

The appellants carry on business with their own customers, the retail dealers, upon the terms that the property in the bottles themselves is not included in the sale, and they contend that when the bottles are empty they are entitled to recover them, not only from their own customers, but from any person into whose hands they may fall, and, further, to prevent them from being used for any purpose of which they do not approve.

I say at once, without going into detail on this part of the case, that in my opinion the appellants have established that, in general at all events, though not universally, as between themselves and their own customers the bottles are not included in the sale so as to pass to the purchaser the property therein as distinct from the right of possession. That this latter right, so long as the bottles contain the appellants' water at all events, passes to the original purchasers is implicit in the nature of the transaction. Further, that these purchasers as retail dealers should be entitled to transfer their possession to members of the public is equally obvious, nor are these ultimate purchasers in any way bound by way of contract by obligations restrictive of the right of user undertaken by the immediate customers of the appellants.

With these preliminary remarks I turn to the facts of this case. The respondent is a retail grocer carrying on business in Edinburgh. He deals in aerated waters, but he is not a customer of the appellants. Besides selling to the public aerated waters of other makers in bottles he possesses a machine called a Vantas Soda Fountain, whereby he is enabled to make and supply to the public aerated waters drawn off from the machine into a jug, bottle, or other container produced by the member of the public asking to be so supplied. These persons sometimes tender bottles originally supplied by and bearing the names of the appellants. The respondent insists on his right to fill such bottles at his customers' request. Whether the appellants are entitled to an interdict preventing him from so doing is the question in this appeal.

There is no question of passing off or assisting others to pass off aerated waters not manufactured by the appellants as their waters. The claim of the appellants rests on their alleged right, by virtue of the property which they say remains vested in them, to prevent any use by any one of the bottles if such use is not authorized by them.

In the first place one has to consider the position of the member of the public who produces the bottle for filling by

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the respondent. He is in lawful possession of the bottle, and in my opinion he remains in such possession notwithstanding that for the purpose of filling he temporarily transfers the manual custody to the respondent. In this respect I agree with the view of Lord Morison founded on the statement of the law by Lord Stair cited by the learned judge. But not only is he in lawful possession of the bottle. There must be many members of the public who know nothing of the terms on which the appellants do business with their own customers and who are entitled to believe that the possession of the bottle carries with it the ordinary incidents of property in a chattel. The mere fact that the appellants' name is on the bottle may well convey to the ordinary purchaser nothing more than the fact that the waters it originally contained were manufactured by the appellant. It would be impossible for the respondent to discriminate between such of his customers, if any, as may be affected by knowledge and such as are not, and even if he were informed that the apparent property in a particular bottle conveys no right in the possessor of it to use the bottle for the particular purpose, I can see nothing in the circumstances to require him to enforce any such restriction by refusing to fill the bottle.

The interdict asked for assumes that the bottles produced for filling belong to the appellants because they are embossed with their name. This assumption is, in my opinion, unfounded in law. If, on the other hand, it is insisted that all the circumstances which might affect the apparent ownership resulting from possession are to be inquired into, the proposed interdict would impose an intolerable hardship on the respondent. As to this it must be borne in mind that no attempt was made to prove any circumstance known to the respondent except the fact of the name being upon the bottles. It is true that he received the warning letter of July 29, 1927, but this was founded on the broad claim that members of the association by whose secretary the letter was issued, including the appellants, do not part with the property in their bottles, and that no one other than a member whose name is on the bottles has a right to use it. This

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claim ignores, what I think is the fact, that in very many cases the possession of the bottle would prima facie confer on its actual possessor the right to use it for any purpose for which it is fitted.

For these reasons I agree with the conclusion of the majority of the Lords of the First Division, and in particular with the opinion of Lord Morison. The result is that in my judgment this appeal fails, and ought to be dismissed with costs.

Interlocutors of the Lord Ordinary and the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, **Nov. 24, 1930.**

Agents for the appellants: *William Webb & Sons, for J. Miller Thomson & Co., W.S., Edinburgh.*

Agents for the respondent: *Baileys, Shaw & Gillett, for Maclay, Murray & Spens, Writers, Glasgow, and J. J. Ross, W.S., Edinburgh.*

A. G. BARR AND COMPANY, LIMITED *v.* MACGEOGHEGAN.

Appeal against an interlocutor of the First Division of the Court of Session and against an interlocutor of the Lord Ordinary (Lord Pitman) in an action of suspension and interdict in which the appellants were complainers.

The appellants were aerated water manufacturers of Glasgow and the respondent was a confectioner of Glasgow. It was conceded that, having regard to the view taken by their Lordships in the previous appeal, there was no material distinction in the facts of the present case.

The Lord Ordinary refused interdict and the First Division, by a majority (Lord Blackburn dissenting), adhered to his interlocutor.

The counsel for both parties were the same as in the previous case.

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Interlocutors of the Lord Ordinary and the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

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Agents for the appellants: *William Webb & Sons, for Ballantine, Haddow & M'Lay, Glasgow, and J. Miller Thomson & Co., W.S., Edinburgh.*

Agents for the respondent: *Baileys, Shaw & Gillett, for Maclay, Murray & Spens, Writers, Glasgow, and J. J. Ross, W.S., Edinburgh.*

[HOUSE OF LORDS.]

EGAN AND OTHERS . . . . APPELLANTS;

AND

ATTORNEY-GENERAL . . . . . . RESPONDENT.

H. L. (E.)*
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Nov. 27.

Civil Service—Royal Irish Constabulary—Disbandment—Compensation payable by Treasury to retiring Officers and Men—Annual Allowance based on Salary—Exclusion of special Allowances in computing Compensation—Children of deceased Constable—Limitation on their Right to Gratuities—Constabulary (Ireland) Act, 1922 (12 & 13 *Geo.* 5, *c.* 55), *s.* 1; *Schedule, Part I., Rules.*

The Royal Irish Constabulary was disbanded on August 31, 1922, by the Constabulary (Ireland) Act, 1922, which provided for the award of compensation to every officer and constable on retirement, and, in the event of his dying after compensation had been awarded to him, for the grant of a pension or gratuities to his widow and children, in accordance with the rules contained in Part I. of the Schedule to the Act.

These rules provided that the annual allowance should be " calculated in like manner " as the pension which the officer or constable would have been entitled to receive if he had retired for length of service under the existing enactments applicable to him, and that, in the event of an officer or constable dying after an annual allowance had been awarded to him under the Act, a pension or gratuity would be granted to his widow and children in like manner as if the allowance were a pension granted to the officer or constable on retirement, and "existing enactments" were defined as including Orders made under those enactments.

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* *Present:* Lord Buckmaster, Viscount Dunedin, Lord Blanesburgh, Lord Warrington of Clyffe, and Lord Tomlin.

The remuneration of the Royal Irish Constabulary consisted of a fixed sum and allowances for rent, lodging and a servant. By an Order made under the Constabulary and Police (Ireland) Act, 1919, in May, 1920, it was provided that none of these allowances should be taken into account for the purpose of computing the pension of any member of the force or the pension, gratuity or allowance of the wife, child or dependant of such member.

By a further Order made under the same Act in March, 1922, it was provided that where a member of the force, having been granted a pension, died within twelve months after the grant, his children under sixteen years of age should be entitled to allowances.

These Orders were in force when the Act of 1922 was passed.

In an action brought by two former officers and a former constable in the Royal Irish Constabulary and the widow and children of a former constable, who died in 1925, the plaintiffs claimed (1.) that in calculating the compensation payable to officers and men serving in the force and the pension or gratuities payable to the widow and children of any who had since died, the Treasury ought to have included in the salary or pay on which compensation was to be based the allowances made to officers and men at the date of disbandment; (2.) that the children of the deceased constable were entitled to compensation, notwithstanding that their father had died more than twelve months after compensation had been awarded to him:—

Held, that the Statutory Orders of May, 1920, and March, 1922, applied and that both claims failed.

Decision of the Court of Appeal [1930] 1 Ch. 238 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Eve J. (2) in favour of the Treasury.

The facts are stated in the report of the case before the Court of Appeal and in the opinion of Lord Buckmaster, and are summarized in the headnote.

1930. Nov. 3. *A. A. Dickie* (*K.C., Ireland*) and *Hector Hughes* (*K.C., Ireland*) for the appellants.

Sir William Jowitt A.-G., *Sir Stafford Cripps S.-G.*, *C. Stafford Crossman*, and *Wilfrid Lewis* for the respondent.

The arguments were substantially the same as before Eve J., except that counsel for the respondent were only called upon to argue in regard to the claims of the infant appellants.

The House took time for consideration.

1930. Nov. 27. LORD BUCKMASTER. My Lords, in 1922 an Act of Parliament was passed known as the Constabulary

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(1) [1930] 1 Ch. 238.

(2) [1929] 2 Ch. 244.

(Ireland) Act of 1922. Sect. 1, sub-s. 1, is in the following terms: " The Royal Irish Constabulary shall be disbanded on such day, not being later than the thirty-first day of August, nineteen hundred and twenty-two, as may be fixed by the Lord Lieutenant, and on or before that date every officer and constable of that Force shall retire from the Force as and when required by the Lord Lieutenant, and shall, on his retirement, be entitled to receive such compensation as may be awarded to him by the Treasury in accordance with the rules contained in Part I. of the Schedule to this Act and, in the event of his dying after a compensation allowance has been awarded to him, the Treasury shall grant a pension or gratuities to his widow and children in accordance with said rules."

The rules contained in the Schedule to the statute deal with the matter in the following way: " 2. The annual allowance shall be calculated in like manner as the pension which the officer or constable would have been entitled to receive if he had retired for length of service under the existing enactments applicable to him and had been qualified in respect of his length of service for a pension. . . . ."

" 4. In the event of an officer or constable dying after an annual allowance has been awarded to him under this Act, the Treasury shall grant a pension or gratuities to the widow and children of the officer or constable in like manner as if the allowance were a pension granted to the officer or constable on retirement, and as if his years of service had been the years on which the allowance was calculated."

" 5. In these rules the expression 'existing enactments' means enactments in force at the time of the passing of this Act and includes any Orders made under those enactments and in force at that time."

The appellants are (1.) three members of the Royal Irish Constabulary disbanded under the provisions of the Act; (2.) the widow of a constable who died after an annual allowance had been made to him under the Act; and (3.) four infant children of the widow, their father having died more than a year after receiving his compensation or allowance. All

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these parties were plaintiffs in the action out of which the appeal had arisen seeking with uniform ill-success in the Court of first instance and in the Court of Appeal declarations which in substance were these, that in calculating the compensation to (1.) and the annual allowance to (2.) the sums received by way of allowances over and above the fixed pay had been improperly disregarded, and as to (3.) that they had been improperly excluded from benefit on the ground that their father had lived more than twelve months after receiving his compensation.

The question to be determined consequently depends upon the true construction of the rules. The remuneration of the Royal Irish Constabulary had consisted of a fixed sum and certain allowances, as for example for rent, lodging and a servant. By a Statutory Order made under the Constabulary and Police (Ireland) Act, 1919, on May 12, 1920, a special order was made with regard to these allowances which were all specified in a schedule, but it was expressly provided by r. 16 that " none of the allowances specified in this schedule shall be taken into account for the purpose of computing the pension or gratuity of any member of the force, or the pension, gratuity or allowance of the wife or child of a dependant of any member of the force." This regulation was in force when the Act of 1922 was passed but two reasons are urged on behalf of the appellants as to why it should not apply in calculating the compensation under the Act of 1922.

In the first place it is said that the wording used by r. 2 provides that the annual allowance by way of compensation " shall be calculated in like manner " as the pension, and that calculation refers merely to an arithmetical process and represents nothing but a fraction which, multiplied by the years of service, is the basis of payment of a pension. If this be so they add that the word " salary " is wide enough, having regard to previous legislation on the matter, to embrace all the allowances, and that they must consequently be included as the sum of which the fractions are to be taken. I agree with Russell L.J.'s opinion upon this point. In his words: "You calculate an annual sum by ascertaining the amount thereof, after taking into account all material factors. You calculate the value of a thing by ascertaining what sum represents its value after taking into consideration all relevant matters which affect its value. Rule 2, as I read it, tells the Treasury to ascertain the amount of the annual allowance, to which any particular man is entitled, by ascertaining what pension he would have been entitled to if his pension had been ascertained under existing enactments, but with the variations which are specified in r. 2." The learned judge goes on to point out that the variations mentioned are four in number, and he adds, as I think with unanswerable force, that the effect of the appellants' argument would be to add a fifth variation which is not there.

This view renders it unnecessary to examine in detail all the statutes to which reference has been made, but they are extensively dealt with in the judgment of Eve J., to which reference may be made for the purpose of examining the antecedent history of the matter. The position with regard to children is a little different. By cl. 6 of the Royal Irish Constabulary Pensions Order, 1922, it is provided that: "(*a*) Where a member of the force dies whilst in the force, or where a member of the force, having been granted a pension, dies within twelve months after the grant of the pension, or at any time from the effects of an injury received in the execution of his duty without his own default, his children under sixteen years of age shall be entitled to allowances until they severally reach the age of sixteen years."

It is said that r. 4 does not introduce these conditions and provides that the children shall be entitled to gratuities irrespective of whether their father dies within the specified time or not. It is admitted that it introduces the condition that they should be under sixteen years of age, but not the other condition that the officer or constable should have died within twelve months of his receiving the pension. I feel unable to accept this view and again I cannot express my opinion better than in the words used by Russell L.J. upon this point: "The words 'in like manner' in r. 4 have the effect, in my opinion, of attaching to the Treasury's obligation

Lord Buckmaster.

to grant, and to the subject-matter of the grant, all the incidents, conditions and restrictions which would have existed in regard thereto if the man's annual allowance had in fact been a pension as described."

On both points, therefore, I am of opinion that the appeal must fail and the full and unanimous judgments of all the judges in the earlier Courts render unnecessary any further and more detailed examination of the statute and the rules. The Crown have stated that they do not ask for costs and there is no need to refer to the matter.

VISCOUNT DUNEDIN. My Lords, I concur.

LORD WARRINGTON OF CLYFFE. My Lords, this is an appeal from an order of the Court of Appeal dated November 8, 1929, dismissing the appeal of the plaintiffs in the action from a judgment of Eve J. dated May 6, 1929, whereby the plaintiffs' action was dismissed.

The appellants (the plaintiffs in the action) are respectively officers, non-commissioned officers, and constables of the now disbanded Royal Irish Constabulary and the widow and children of Percy Shea deceased, formerly a constable in the force who died more than twelve months after the grant to him of a compensation allowance under the Constabulary (Ireland) Act, 1922. The object of the action was to obtain certain declarations to the effect that, in the case of the officers, non-commissioned officers, and constables, the compensation allowances had been improperly assessed, inasmuch as, in arriving at the amount thereof, the Treasury had based their calculations on pay only exclusive of certain allowances to which the several claimants had been entitled in addition to their pay, and, in the case of the children of Percy Shea, a pension or gratuity had been refused to them by reason of the fact that their father had received a compensation allowance and had died more than twelve months after the grant thereof. Both points turn on the true construction of the rules contained in Part I. of the Schedule to the above mentioned Act, by which it was enacted (s. 1, sub-s. 1) that the force should be disbanded on a certain day on or

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before which every member thereof should retire and should on his retirement be entitled to receive such compensation as might be awarded to him by the Treasury in accordance with such rules, and, in the event of his dying after a compensation allowance had been awarded to him, the Treasury should grant a pension or gratuities to his widow and children in accordance with the said rules.

The material rules are as follows: "1. The compensation which may be awarded to an officer or constable shall be an annual allowance. 2. The annual allowance shall be calculated in like manner as the pension which the officer or constable would have been entitled to receive if he had retired for length of service under the existing enactments applicable to him and had been qualified in respect of his length of service for a pension, save that, for the purposes of that calculation, the following provisions shall have effect." Then follow certain provisions none of which are material to the present question. "4. In the event of an officer or constable dying after an annual allowance has been awarded to him under this Act, the Treasury shall grant a pension or gratuities to the widow and children of the officer or constable in like manner as if the allowance were a pension granted to the officer or constable on retirement and as if his years of service had been the years on which the allowance was calculated."

The first of the two questions mentioned above turns upon the fact that by the Royal Irish Constabulary Allowances Order, 1920, made under the Constabulary and Police (Ireland) Act, 1919, and by virtue of which alone the allowances in question were enjoyed, it is expressly provided (cl. 16) that none of the allowances shall be taken into account for the purpose of computing the pension or gratuity of any member of the force or the pension, gratuity, or allowance of the wife, child, or dependant of any member of the force.

Under the rules above quoted the annual allowance is to be calculated in like manner as the pension which the officer or constable would have been entitled to receive if he had retired for length of service. Under the Royal Irish Constabulary Pensions Order, 1922, the pecuniary basis of calculation is the annual pay alone and, as already pointed out, the allowances are not to be taken into account.

The calculation of the annual allowance in question is to be made in like manner as a pension. The pecuniary basis therefore must be the same as in the case of a pension and the amount of the allowances cannot properly be taken into account. As the allowances cannot be taken into account for the purpose of " computing " the pension neither can they be taken into account for the purpose of " calculating " the compensation.

On this point I am clearly of opinion that the appeal fails.

The second point is this. The power to grant allowances and gratuities to children is confined to the case of children of a man who having been granted a pension dies within twelve months. I agree with Russell L.J. that the words " in like manner " as if the allowance were a pension " have the effect of attaching to the Treasury's obligation to grant and to the subject-matter of the grant all the incidents, conditions and restrictions which would have existed in regard thereto if the man's annual allowance had in fact been a pension as described."

In my opinion the appeal fails and ought to be dismissed. I understand the Crown does not ask for costs.

LORD TOMLIN. My Lords, I concur.

LORD BUCKMASTER. My Lords, my noble and learned friend, Lord Blanesburgh, has asked me to say that he agrees with the judgment which has been read.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, November 27, 1930.

Solicitors for the appellants: *Ranger, Burton & Frost.*
Solicitor for the respondent: *Treasury Solicitor.*

[HOUSE OF LORDS.]

OWNERS OF STEAMSHIP ALCANTARA. Appellants;

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AND

OWNERS OF SAILING SHIP TOVARISCH . . . . } Respondents.

[THE TOVARISCH.]

Shipping—Collision—Flare-up Light—Green Pyrotechnic Light—Regulations for Preventing Collisions at Sea, 1910, *art.* 12.

By art. 12 of the Regulations for Preventing Collisions at Sea, 1910: "Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal."

A large four-masted barque, after seeing both lights of an approaching steamship about one and a-half to two points on the starboard bow, saw only the green light at an estimated distance of about half a mile. Thereupon a green pyrotechnic flare was exhibited on the starboard side of the barque. Immediately afterwards the steamship ported her helm, and, in attempting to cross the bows of the barque, was struck on the port side by the bowsprit and stem of the barque and sank with all hands except one:—

Held, that the exhibition of the green flare by the barque was not a breach of art. 12; that the green flare was intended simply to attract attention, and did not call upon the steamship to do anything except that which it was her duty to do when she saw a sailing vessel approaching with lights green to green; and that the steamship, by improperly porting, was alone to blame for the collision.

Decision of the Court of Appeal [1930] P. 1 affirmed.

Appeal from a decision of the Court of Appeal (1) reversing a decision of Hill J. (2) in an action of damages by collision.

The appellants (plaintiffs) were the owners of the Italian steamship *Alcantara*, the respondents (defendants) were the owners of the Russian sailing ship *Tovarisch*. The collision occurred in hazy weather on the night of February 24, 1928, off Dungeness, when the *Alcantara* was bound up channel to Calais, laden with mineral ore, and the *Tovarisch*, which was employed as a training ship for cadets, was bound down channel. The *Alcantara* was struck on the port side by the bowsprit and stem of the *Tovarisch* and sank, twenty-three out of her crew of twenty-four being drowned. The *Tovarisch* saw both side lights of the *Alcantara* one and a-half to two points on the starboard bow, and about a minute later, when the vessels were about half a mile apart, lost the red and had only the green light about two points on the starboard bow. Upon this the helm of the barque was hard-a-starboarded and a green pyrotechnic light was lit and exhibited from the starboard side of her bridge. Thereupon the *Alcantara* ported her helm, and when her red light reopened to those on board the *Tovarisch* the helm of the barque was hard-a-ported and the collision happened.

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* *Present:* Lord Buckmaster, Viscount Dunedin, Lord Blanesburgh, Lord Warrington of Clyffe, and Lord Thankerton.

(1) [1930] P. 1.

(2) [1929] P. 293.

Hill J. held that the exhibition of the green pyrotechnic light was not authorized by the Regulations for Preventing Collisions at Sea, 1910, and was calculated to lead to confusion, and he gave judgment for the appellants.

The Court of Appeal (Scrutton, Lawrence and Greer L.JJ.) reversed the decision of the learned judge. The Lords Justices were of opinion that the use of the green flare was not a breach of the regulations, and that it did not entitle the *Alcantara* to break the regulations and to cross the bows of the approaching sailing vessel. As to the *Tovarisch*, they did not think that hard-a-porting her helm had anything to do with the collision. They therefore held that the *Alcantara* was solely to blame for the collision.

1930. Nov. 10. *Digby K.C.* (with him *Cyril Miller*) for the appellants. The exhibition of a green pyrotechnic flare by the *Tovarisch* was not justified in the circumstances under the Collision Regulations and was a breach of those Regulations. A green flare is entirely unknown as a public signal. The effect of the green flare was to mislead those on board the *Alcantara* and to cause them improperly to change her course. As to the manœuvres of the *Tovarisch*, she ought to have kept her course. She was wrong in the first instance in hard-a-starboarding, but having made that mistake she ought to have continued the hard-a-starboarding and should not have ported, and her action contributed to the collision.

Dunlop K.C., *Harold Stranger* and *Krougliakoff* for the respondents were not called on.

The House took time for consideration.

1930. Nov. 27. Lord Buckmaster. My Lords, this is an appeal by the owners of the Italian steamship *Alcantara* against the owners of a ship known as the *Tovarisch*, a training ship used for cadets by the merchant marine of the Soviet Government, asking for damages consequent upon a collision that took place near to Dungeness on February 24, 1928.

It was a disaster which resulted in grave circumstances, for the *Alcantara* was wholly sunk and all her crew but one were lost. The *Tovarisch* was damaged, but suffered no loss of life.

The *Tovarisch* is a four-masted sailing ship 284 feet in length, and she was coming down channel on the night in question on a course S. 60 degrees W. at about 6½ knots. The *Alcantara*, a vessel 289 feet in length, was proceeding up channel from Carloforte in Sardinia to Calais with a cargo of 2700 tons of mineral ore, her course was N. 79 E. and she was making about 6½ knots. It is accepted by the learned judge that the *Tovarisch* was carrying the proper regulation lights, but they were not electric lights as were those of the *Alcantara*. None the less there is no evidence whatever to suggest that they were not visible at a sufficient distance to warn the *Alcantara*, were those on board keeping a proper look out. It is in fact no longer alleged that those in charge of the *Tovarisch* were negligent in improperly failing to exhibit side lights. The two vessels approached starboard to starboard. The learned judge has held inferentially rather than by direct finding that the green light of the *Tovarisch* was not seen by those on board the *Alcantara*, and if she did see it, her conduct was certainly extraordinary, for she ported her helm, with the result that a collision took place at an angle of about 45. Upon the evidence it appears to be impossible to hold that the green light of the *Tovarisch* was not visible to the *Alcantara*. The learned judge himself said on the evidence, " I find that the green light was burning. The lamp is a good type of lamp, and I am unable to find that the green light, in fact, was not being exhibited according to the rules." Did the matter rest there little ground would be afforded even for argument, but a further incident occurred in relation to which the greater part of the controversy arises. The *Tovarisch* as she was drawing near lit a green pyrotechnic flare from the starboard side of the bridge, which was about 72 feet forward of the wheel, its object being, as was said, to show the length of the ship. It is suggested that this light may have obscured the green starboard light, but there was no evidence called to show that this would be its effect, and that it did so is a pure conjecture. But it is further urged that the exhibition of the light was in defiance of the regulation for preventing collisions at sea, and that its result was to make the *Alcantara* think that she must instantly take some action, whereas, in fact, if she had pursued her normal course the collision would have been avoided.

Art. 12 of the regulations is in the following words: " Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal."

I agree with the judgment of the Court of Appeal in thinking that this does not prohibit the exhibition of a green light. It permits any light excepting those that are specially referred to, and I find myself unable to believe that these regulations, intended for the use of men at sea, have to be construed by working backwards and seeing what other regulations have provided on previous occasions. The light, under the rule, was to call attention. It was to do no more, and there is no foundation for the argument that it called upon the *Alcantara* to do anything except that which it was their duty to do when they saw a sailing vessel approaching with the lights green to green. Finally the appellants contend that the manœuvres of the *Tovarisch* contributed to the accident. They did, in fact, first starboard and then port their helm, but the result, according to the finding of the learned judge, did not materially alter her course, and I cannot see that it in any way contributed to the accident. That lamentable event was due to the *Alcantara* attempting to cross the bows of the *Tovarisch*, and for this I cannot find any justification. I have throughout assumed that the *Alcantara* saw the green light of the *Tovarisch* before the flare was shown. I have stated my reasons for that conclusion. I also think that it follows that the *Tovarisch* was known to be a sailing ship, and these are, to my mind, the two critical and material matters upon which responsibility for this disaster depends. In differing, as I do, from Hill J., I think it right to say that the difference is due, first, to the question of the exhibition of the flare and, secondly, to the question of the visibility of the green starboard light of the *Tovarisch*. The learned judge nowhere holds that it was not in fact displayed or seen, but seems to conclude that the action of the *Alcantara* was so foolish that it can only be referable to the fact that it had not been seen. I fear I cannot go with him to that conclusion. The reasons that may have led to the *Alcantara's* action cannot now be accurately determined, but experience shows that it is not safe to assume that a thing cannot have been done because its commission would be an act of folly.

VISCOUNT DUNEDIN. My Lords, I concur. The whole argument of the *Alcantara* depended upon the assumption that the green flare was equivalent to an invitation or even an injunction to the other vessel to change its course. Now that assumption is not based on any of the nautical rules which have become embedded in positive law; nor, according to the advice given to us by our assessors, is it founded on any well recognized practice of seamanship.

LORD WARRINGTON OF CLYFFE. My Lords, I have had an opportunity of reading and considering the opinion pronounced by my noble and learned friend on the Woolsack, and I agree in it.

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S.S. ALCANTARA *v.* SAILING SHIP TOVARISCH.

LORD THANKERTON. My Lords, I concur.

LORD BUCKMASTER. My Lords, my noble and learned friend, Lord Blanesburgh, has asked me to state that he agrees with the judgment which has been read.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 27, 1930.

Solicitors for the appellants: *Richards, Butler, Stokes & Woodham Smith.*

Solicitors for the respondents: *Middleton, Lewis & Clarke.*

[HOUSE OF LORDS.]

H. L. (E.)*

1930

Dec. 9.

ELLERMAN LINES, LIMITED . . . . APPELLANTS;

AND

MURRAY . . . . RESPONDENT.

WHITE STAR LINE OF ROYAL AND UNITED STATES MAIL STEAMERS OCEANIC STEAM NAVIGATION COMPANY, LIMITED . . . . APPELLANTS;

AND

COMERFORD . . . . RESPONDENT.

Shipping—Wages—Wreck of Ship—Unemployed Seaman—Merchant Shipping (International Labour Conventions) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 42), *s.* 1, *sub-ss.* 1 *and* 2.

Sect. 1 of the Merchant Shipping (International Labour Conventions) Act, 1925, provides: "(1.) Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated by the agreement, he shall . . . . , subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date.

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, and LORD MACMILLAN.

(2.) A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day" :—

Held, by Viscount Dunedin, Lord Warrington of Clyffe, Lord Tomlin, and Lord Macmillan (Lord Blanesburgh dissenting), that upon the true construction of the section a seaman whose service had been prematurely terminated by the wreck or loss of the ship was entitled to receive wages at the rate payable under his agreement of service for each day on which he was in fact unemployed during a period of two months from the date of the termination of the service, whether his service under the agreement would in the normal course have terminated before the expiration of that period or not, unless the owner discharged the onus cast upon him by sub-s. 2.

Held, further, that, the section being unambiguous, it was not permissible to refer to the preamble of the Act or to the draft convention to which the Act was intended to give effect in order to give the section a meaning other than its natural meaning.

Decision of the Court of Appeal [1930] P. 197 affirmed.

APPEALS from a decision of the Court of Appeal (1) affirming a decision of Lord Merrivale P. (2) in two actions brought by seamen against shipowners. Both cases raised a question under the Merchant Shipping (International Labour Conventions) Act, 1925, as to a seaman's right to wages after his services had been terminated by the wreck or loss of the vessel on which he had been employed.

In the first appeal the respondent was employed as quartermaster and able-bodied seaman on the steamship *Croxteth Hall*, owned by the appellants, Ellerman Lines, Ld. The ship was wrecked off Flushing on February 27, 1929. The respondent brought an action against the appellants claiming, so far as relevant to the present appeal, two months' wages from the date of the wreck. The respondent's service under his agreement of employment would in the normal course have terminated on March 10, 1929, and the appellants offered to pay wages up to that date, but they declined to pay any further wages.

In the second appeal the respondent was employed on the White Star Liner *Celtic* as a refrigerating greaser and seaman. The *Celtic* was wrecked off Queenstown on December 10,

(1) [1930] P. 197. (2) [1930] P. 20.

1928. The respondent brought a similar action against the appellants. The respondent's service would in the normal course have terminated on December 11, 1928, and the appellants repudiated any liability for wages after that date. Both cases had been referred to the Admiralty Division by a court of summary jurisdiction at Liverpool under s. 165 of the Merchant Shipping Act, 1894. Lord Merrivale P. gave judgment in favour of the respondents, and his judgment was affirmed by the Court of Appeal by a majority (Scrutton and Greer L.JJ.; Slesser L.J. dissenting)

1930. Nov. 4. *Sir Leslie Scott K.C.* and *Dunlop K.C.* (with them *A. J. Hodgson*) for the appellants in both appeals. The statutory right of a seaman under this Act is to an indemnity against loss of wages under his agreement of service by reason of the wreck of the ship. The whole statute is dealing with seamen's agreements of service. Unemployment after the natural termination of the agreement cannot be said to be due to the effect of the wreck. Upon the true construction of s. 1 the right conferred on a seaman on the premature termination of his agreement of service by the wreck of the ship is not a right to two months' wages in any event, but only a right to receive wages so long as his employment under his agreement would have extended if there had been no wreck. The section being ambiguous, it is permissible to look at the title of the Act, and the preamble, and the Schedule containing the Convention to which the Act was intended to give effect, in order to explain the meaning of the section. The preamble recites that at Genoa the International Labour Organization of the League of Nations on July 9, 1920, adopted a draft convention concerning unemployment indemnity to seamen in the case of loss or foundering of their ship and that this Act was passed to give effect to that convention. The interpretation put upon s. 1 by the Courts below is inconsistent with the terms of the Convention to give effect to which was the expressed purpose of the Act. Upon that interpretation the right given to the seaman is in no sense an indemnity against loss of wages.

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Lynskey K.C. (with him *Fraser Harrison*) for the respondents in both cases. Sect. 1 of the Act is clear and unambiguous, and therefore regard cannot be had either to the preamble or to the Convention. The section does not limit the period for which a claim can be made in respect of unemployment to the duration of the voyage or the service under the agreement, but it gives an absolute right to wages during the two months unless the owner discharges the onus imposed upon him by sub-s. 2. The two months' period is an artificial period having no relation to the period of the engagement. Proof that the seaman's service under his agreement of employment would have terminated during the two months does not discharge the onus cast upon the owner of showing that the seaman's unemployment after that date was not due to the wreck or loss of the ship. As to the use of the word "indemnity," in the preamble and in the Convention, the indemnity referred to is against unemployment, not unemployment under a particular agreement of service. Indemnity is defined in the Oxford Dictionary as meaning "security or protection against contingent hurt, damage or loss." In that sense this section confers an indemnity on the seaman.

[He referred to *Horlock* v. *Beal.* (1)]

Sir Leslie Scott K.C. replied.

The House took time for consideration.

1930. Dec. 9. VISCOUNT DUNEDIN. My Lords, the facts in this case, so far as material, are capable of being stated with the utmost brevity.

The ship *Croxteth Hall*, on board of which the respondent was a seaman, was wrecked and lost on February 28, 1929. At that time she was homeward bound, and, if nothing untoward had happened, the crew would have been paid off at Middlesbrough on March 11, 1929. The crew were brought home to Liverpool, and on March 4 the respondent was paid off. The respondent claimed wages for two months from February 28. He was, in fact, unemployed for that period,

(1) [1916] 1 A. C. 486, 493.

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and, though he had tried, he had not been able to secure employment. The appellants expressed their willingness to pay, and did pay, the wages up to March 11, the date on which the payment for the voyage would have taken place if it had been terminated in due course, but refused to pay any more.

The respondent started proceedings to recover the two months' wages, so far as unpaid, in a court of summary jurisdiction in Liverpool. The case was referred to the Probate and Admiralty Division of the High Court, under the provisions of s. 165 (iii.) of the Merchant Shipping Act, 1894. Lord Merrivale, the President of that Court, gave judgment in favour of the present respondent. Appeal was taken to the Court of Appeal, who, by a majority, Slesser L.J. dissenting, confirmed the judgment. There had been, in fact, certain other points mooted before Lord Merrivale, but they have disappeared from the case and need not be mentioned. From that judgment there is the present appeal.

At common law, if a ship was lost on a voyage, a seaman who, although through no fault of his own, could not, in fact, perform his share of the contract of service could recover nothing. This was altered by s. 158 of the Merchant Shipping Act of 1894, which gives wages up to the time of the wreck which terminated the service. Then comes the statute on the interpretation of which the matter turns. It is the Merchant Shipping (International Labour Conventions) Act, 1925, and the relevant section is as follows:—

"1.—(1.) Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date.

(2.) A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day.

(3.) In this section the expression 'seaman' includes every person employed or engaged in any capacity on board any ship, but, in the case of a ship which is a fishing boat, does not include any person who is entitled to be remunerated only by a share in the profits or the gross earnings of the working of the boat."

My Lords, I confess that I have had considerable difficulty in coming to a conclusion in this matter, but in the end I have come to think that the judgment of the Appeal Court is right. It is necessary to say that in the inquiry held before Lord Merrivale it was shown that it was the custom for men who had been on this ship to be allowed to sign on for the next voyage. In other words, if nothing untoward had happened, it would have been more likely than not that the respondent would at once have been taken on for the next voyage, and so would not have remained in unemployment. The appellants were very anxious to point out that the Convention, to give effect to which the Act was passed, uses the word "indemnity," and the only proper indemnity that could therefore be given was the wages, so far as they could be due under contract, which contract was frustrated by the wreck. I do not think there is anything in this argument, and for this reason. If "indemnity" is used in a loose sense, what is given by this Act is an indemnity whichever of the two views be taken, but if it is used in a strict sense—and unless it is so used it is no use to the appellants—then it is very significant that, although the framers of the Act are well aware of the word, for they refer to it in the preamble, when it comes to the operative section they do not use it. I think, therefore, we must take the Act as it stands.

Now, I do not think that there is any doubt whatever as to the meaning, for I find no ambiguity in sub-s. 1 of s. 1. There must be a wreck which terminates the service, which

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service is spoken of as being under an agreement; and, if so, it is obviously possible that the agreement provides for a definite termination. If that is so, then there must be in fact unemployment for two months, and if all these facts concur, then he is entitled to two months of his old wages running from the termination of the service, i.e., the wreck. That is all expressed quite absolutely, and the question would be at an end were it not for the words "subject to the provisions of this section." That indicates that there is something else to come. That something else comes in sub-s. 2, but here the onus, so to speak, is shifted. The seaman must show the various things I have enumerated to bring him under sub-s. 1. If he does that, his portion is accomplished. Then the shipowner, to get out of that position, must show what is demanded in sub-s. 2 "if the owner shows . . . ." It has been found as a fact in this case that the owner cannot show that the seaman was able to obtain employment on any day within the two months.

The sole question, therefore, left is: Can the owner show that the unemployment was in fact not due to the loss of the ship? I do not think he can. The onus is on him. It is not for the seaman to show that he would have been employed. It is for the owner to show that he would not have been employed, and on the face of the evidence as to what would have happened if the ship had still been in being I do not think that the owner can do so.

But, as Scrutton L.J. says, each case must depend on its own facts. On the facts in this case, I think that the respondent has clearly brought himself within sub-s. 1, and the appellants have not discharged the burden imposed upon them in sub-s. 2 to take the respondent out of the operation of sub-s. 1. The facts in the second appeal are essentially the same as the facts in this appeal.

I move, therefore, that both appeals be dismissed.

Lord Blanesburgh. My Lords, by s. 7 of the Merchant Shipping (International Labour Conventions) Act, 1925, it is directed that the Act is to be construed as one with the

Merchant Shipping Acts, 1894 to 1923. The Act—I will now refer to it as the Act of 1925—thus becomes a constituent part of a statutory code with special meanings attached to some of its terms by definition and to others by accepted usage or judicial decision. The result of course is that a meaning may necessarily be attributable to its provisions very different from that which would attach to the very same words in an independent enactment.

And the incorporation of the Act in the code with that result supervening is of its very essence. It is passed, as its preamble states, to give effect (inter alia) to the Convention set forth in its First Schedule; and, as a reference to s. 1 immediately shows, the method adopted to achieve that purpose is not, as it might have been, to transfer the international language of the Convention to the body of the Act, *simpliciter*, but it is to translate that language into the phraseology of the Merchant Shipping Acts and to give statutory effect to the Convention in that form of words, for better or for worse.

Sect. 1 in the result is a pregnant section. It does not carry its full meaning upon its face. It is only by reference to the provisions of what I may call the code that its real effect can be ascertained. And most particularly is this true of the term "wages," the fundamental word of the section, three times repeated, almost insistently, and always without periphrasis or qualification. What does that word connote in the language of the code? Can it have attributed to it, in its setting or at all, the meaning which must be placed upon it if the respondent's claim, sustained by the Court of Appeal, is to succeed, or is its necessary interpretation such as to exclude that claim altogether?

And, my Lords, following an investigation of the provisions of the code, I have reached the conclusion that, whatever may be the meaning of the word in a dictionary sense, or even in a section of an isolated Act of Parliament, "wages," in a Merchant Shipping Act, has a perfectly definite signification which is quite inappropriate to quantify the respondent's present claim. It is, be it at once noted, neither compensation, nor an indemnity, nor a gratuity that the seaman is to receive under the section. He is to have "wages" and nothing else. The use of the word, I have satisfied myself, is deliberate. It is full of meaning as a code word. When that meaning is ascertained the first paragraph of the section, which on its face, as I quite agree, is unqualified, becomes at once restricted, inasmuch as it is now disclosed that there can be no "wages" properly so called receivable by a "seaman" properly so called, beyond those provided for in his agreement with the owner current at the date of the wreck of his vessel and referred to in the section.

My Lords, that conclusion, if it be right, enables me to place upon this section of the Act of 1925 a construction which appears to be at once consonant with the declared purpose of the Legislature, not inconsistent with sound sense, and in entire accord with the Convention. Accordingly I crave your Lordships' indulgence if I endeavour to justify it as concisely as I can, but nevertheless at greater length than I care for. I do so because I see in this case a problem of first importance both to the seamen and to the owners of lost ships, and it is fitting that it should be ventilated in your Lordships' House from every point of view.

In the sections of the code relating to seamen no provisions are so elaborate as those dealing with their "wages." "Seamen's wages," in their essential characteristics, have been for generations a term of art in maritime law. Possibly for this reason the expression is not, in the code, made the subject of full definition, "wages" being there only defined to the extent of saying that the term includes "emoluments" (Merchant Shipping Act, 1894, s. 742). And incidentally I may observe as illustrating by an early example the precision of meaning held to be attached to the word throughout the code, that even the addition to "wages" of "emoluments" does not bring "maintenance" within their ambit: *Palace Shipping Co.* v. *Caine.* (1) And the content of "the term 'wages' as used in the Merchant Shipping Act of 1894," to adopt Lord Macnaghten's phrase in the case cited, is, in

(1) [1907] A. C. 386, 393.

all essentials, not to be mistaken. To a seaman's wages, invariably so called, there are annexed in the code privileges, incidents, restrictions, safeguards, elsewhere unknown to the law, and never made incident to any advantage from his service, accruing to a seaman, under some other description.

A seaman's wages, for example, whether due or accruing, are not subject to attachment or arrestment: an assignment of them prior to accruer is not binding on the seaman: a power of attorney or authority to receive them is not irrevocable: payment of wages to a seaman is valid in law notwithstanding any previous sale or assignment, attachment, incumbrance or arrestment of the same wages (Merchant Shipping Act, 1894, s. 163). Before 1906 a seaman might not insure his wages, even if earned: see now Marine Insurance Act, 1906, s. 11.

On the other hand a seaman had and has in respect of wages two privileges the enjoyment of which furnish, as will be seen later, a valuable clue to the true construction of the Act of 1925. He has for his wages, but for them only, a maritime lien upon his ship, and he may also recover any wages due to him in a court of summary jurisdiction, which, incidentally, may be situate in or near the place "at which his service has terminated" (Merchant Shipping Act, 1894, s. 164)—words strongly indicative that there will be no "wages" coming to him after that date.

But what are the essential qualities of the "wages" to which these incidents—privileges and restrictions alike—are attached? These are, as I have already indicated, unmistakable. Beginning with the Merchant Shipping Act, 1853, when the old doctrine that freight was the mother of wages was finally superseded (see now Merchant Shipping Act, 1894, s. 157), the word "wages," as used in Merchant Shipping Acts, is in full consonance with Lord Stowell's well known description of them in *The Neptune* (1)—a description peculiarly apposite in the present case.

"The natural and legal parents of wages," Lord Stowell says there, "are the mariner's contract and the performance

(1) (1824) 1 Hagg. Adm. 227, 232.

of the service covenanted therein; they in fact generate the title to wages."

This description is now embodied and amplified in ss. 113 and 114 of the Merchant Shipping Act, 1894. The seamen's "wages" are a principal subject-matter of the written agreement with the crew thereby made compulsory. That agreement, to which the old description of ship's articles still clings, must be in a form approved by the Board of Trade and it must contain amongst its provisions (*a*) particulars of the nature and duration of the voyage; and (*e*) "the amount of wages which each seaman is to receive"—the two cardinal points in the ship's articles on which, as Mr. Maclachlan observes (6th ed., p. 161), Lord Stowell was occasionally obliged to interpose for the protection of the seaman against the fraudulent devices of dishonesty—a task now entrusted to the Board of Trade.

And the seaman is entitled as "wages" to no sum which is not, as such, entered in that agreement. "Under ss. 113 and 114 of the Merchant Shipping Act, 1894," said Lord Coleridge J. in *Thompson* v. *H. and W. Nelson, Ld.* (1), paraphrasing earlier cases to the same effect, "a seaman can only recover as wages the amount specified in the articles."

Further, it is with reference to these wages alone, as has been already indicated, that in its application to seamen the word is used throughout the code. "Maintenance," as we have seen, is not "wages." The "double pay" for which the owner may be liable under the Merchant Shipping Act, 1894, s. 135, is not "wages": the compensation, "not exceeding one month's wages" recoverable under the Merchant Shipping Act, 1894, s. 162, is not "wages": nor is the compensation in like circumstances recoverable by a seaman who has signed a fishing boat's agreement: Merchant Shipping Act, 1894, s. 411.

It should however be added that "while the service covenanted in the articles," to repeat Lord Stowell's words, still remains one of their parents, "wages" in the statutory sense may nevertheless be payable to a seaman who has

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(1) [1913] 2 K. B. 523, 527.

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not rendered service in respect of them, e.g., where he has been disabled by accident during the voyage: *Chandler* v. *Grieves*. (2) But not for any time beyond the stipulated voyage, *ibid.* Accordingly, if the Act of 1925 be so limited in its operation, it has made no new departure in the use of the term. But not otherwise.

Now what are the *soi-disant* "wages" which the respondent is asking for in this case? They represent a sum claimed from the owner of a ship that has been lost, with whom the respondent has no agreement for its payment, in return for no service to be rendered by himself, with no voyage in contemplation and no ship to undertake one. It is only as a "seaman" of course that the respondent is under the Act entitled to receive anything. But in relation to this claim the respondent is not even a "seaman." "A seaman" (Merchant Shipping Act, 1894, s. 742) "is a person . . . . employed or engaged . . . . on board any ship."

Is it not therefore now plain—I suggest to your Lordships it has become so—that to assert with regard to such a claim, as the respondent must, that it is a claim to receive "wages" by himself as a "seaman" is a statutory contradiction in terms?

And, my Lords, this examination of the code instructs a statement of the rival views of the Act of 1925 which may at this point be helpful. The appellants' view is that subject to the provisions of s. 1, a seaman is entitled, during unemployment, to receive his "wages" for a period of two months after the wreck of his ship if his service contemplated by the articles would but for the wreck so long have continued: the respondent's view is that the seaman is so entitled to receive his "wages" whether these are in any sense covered by the articles, even, indeed, if they are altogether outside the articles or another agreement with the owner.

More briefly expressed, the maximum period over which wages may under the section be received is two months from the date of the wreck, if, in the appellant's view, there are for so long under the articles wages to be paid; whether, in the respondent's view, there are wages so to be paid or not.

(1) (1792) 2 H. Bl. 606*n*.

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Now, my Lords, in contrasting these rival views of this section the appellants have I suggest one initial advantage. They reach their conclusion without the addition to the section of any words not already there. Their construction would, of course, have been clear to demonstration if the section had run "in respect of each day *of the contemplated term of service*." But if the draftsman is using the word "wages," in what I may call the sense of the Code, he is entitled to have it said that words to the effect of the inserted words are already implicit in "wages," and that to repeat them would strictly be redundant if not tautologous. And this draftsman is assuredly a man of few words.

The respondent is, in this matter, less fortunate. If wages are used in the sense of the code, then words of extension, or words making "wages" merely referential, are, as it seems to me, essential, if the section is to be expanded to cover his demand. For instance, if a claim like his had ever been in contemplation at all, the precedent set by another section of the Code, Merchant Shipping Act, 1894, s. 162, almost *in pari materia* and already referred to, would surely have been followed, and the seaman declared entitled to receive not "wages" but "compensation," or, if you prefer it, "an indemnity" or "a gratuity" "at the rate of the wages to which he was entitled at that date." By the addition of some such descriptive word, with the term "wages" merely referential, the respondent's construction of the section would have been established. But none of these descriptive words are to be found, nor is anything said from which their presence may be implied. On the contrary, the other provisions of, and the omissions from, as well as the form of, the section are, I think, eloquent to show that no such implication was ever intended—in other words that the respondent's present claim is intended to be and is in fact outside the section altogether.

In justification of this statement I will first refer to an omission from the section. The scheduled Convention to which it is the avowed purpose of the Act of 1925 to give effect, provides in art. 3 that seamen are to have the same remedies

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for recovering their "indemnities" as they have for recovering arrears of wages earned during service. The remedies there pointed at are, so far as British seamen are concerned, those provided for in the Merchant Shipping Act, 1894, s. 164, already summarized. Now there is no reference at all in the Act of 1925 to any such remedies. Quite unnecessary, of course, that there should have been, if it is only code "wages" which are under the Act being made recoverable. But if, as the respondent contends, the word "wages" extends to something which is not code wages at all—e.g., compensation, indemnity, gratuity — then the Act fails altogether to give effect to the Convention in this respect. It was suggested on behalf of the respondent, faced with this difficulty, that it was got over by the fact that the receipts under the Act are there described as "wages," a description of itself sufficient to attract to them all the Code procedure relating to the recovery of wages properly so described. But here once again the respondent is called upon to recognize that the Act of 1925 is itself part of a Code. And it is not in that way that the Code provides for such a case. Sect. 1, if such were its effect, would be in this Code quite *sui generis*. Where it is desired that something which is not "wages" shall be recoverable as such the Code says so in express terms. I refer as typical examples—the list might be greatly extended—to s. 135, sub-s. 3, and s. 411 of the Merchant Shipping Act of 1894, and to s. 42, sub-s. 2, of the Merchant Shipping Act of 1906. This omission from the statute, not, as I think, to be explained if the respondent's view of the enactment be correct, is, I cannot doubt, strongly confirmatory of the appellants' contention as to the true meaning of s. 1.

But, my Lords, the provision of the section to which I now proceed is even more illuminating in this same direction. The Act of 1925 by s. 1 becomes operative only if by reason of the wreck of the ship on which he was employed a seaman's service "terminates *before* the date contemplated in the agreement." The significance of these last words will not be lost when it is noted that, in point of effect, they are identical

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with and have been taken from s. 158 of the Act of 1894, itself referred to in s. 1. Indeed if the two sections are laid side by side it is at once seen that they are completely complementary each to the other. A vessel is wrecked in the course of a voyage. Her seamen's wages under the articles prior to the wreck are dealt with in s. 158: these wages, or some of them, subsequent to the wreck in s. 1. But nothing but these wages is being dealt with in either section. True it is that in relation to "wages" one great extension, in point of principle, is made in 1925, beyond the stage reached in 1894—an extension which is never to be forgotten in this case, if the exceptional character even of the admitted burden now laid upon owners is to be fully appreciated. The wages for which, under s. 158, the owner is made liable are in respect of services which, albeit fruitlessly, had at least been rendered to him by the seaman. Under s. 1 of the Act of 1925, however, the owner is being made to pay "wages," although no service whatever need in return either be rendered or tendered to him by the seaman receiving them. Apart from this distinction, which certainly does not instruct judicially the extension of the owner's liability beyond express definition or clear implication, the correspondence of the two sections seems complete. The event is the same: the agreement in relation to any one seaman is the same: the wages in Merchant Shipping Act, s. 158, are indubitably "code wages," and if it remains in any way doubtful whether the "wages" in s. 1 of the Act of 1925 are other than the same "wages" which but for the wreck would have been payable under the same agreement—the limitation established, as I suggest *aliter*—note how that doubt is weakened if not indeed resolved by the fact that to make either section operative the wreck of the vessel must have taken place before the termination of the seaman's contemplated service, and not later. To s. 158 that condition was of course essential, for the reason that had it been omitted the whole section would have been otiose and superfluous. But the condition is transferred almost textually to s. 1 of the Act of 1925, and for no other imputable reason, as I suggest, than that its presence in that section, on its only true construction, was essential, if the section was to be in no circumstances inoperative. There must be at least one day's "wages" to be received under it, if the section is to be of any use at all to the seaman.

But, on the other hand, my Lords, if the "wages" to be receivable under this Act of 1925 have in point of duration no relation to the provisions of the current articles it is, I suggest, difficult to understand why a person whose remuneration is based upon the profits of the voyage should be excluded from the benefit of the Act, s. 1, sub-s. 3, while it is inconceivable that the above condition could have been deliberately transferred over from s. 158. In relation to such an enactment as is now hypothesized the condition is alike arbitrary and senseless. This is well illustrated by the case of the *Celtic*, the subject of the second appeal. The *Celtic* foundered off Queenstown on December 10, 1928, her voyage being contemplated to end at Liverpool on the next day, December 11. The respondent to that appeal, Comerford, has, by the Court of Appeal, which accepted his contention, been awarded two months' wages from the earlier date. If, however, his vessel, instead of foundering off Queenstown on the 10th, had foundered off Liverpool on December 11, all benefit to Comerford must, under the section, have been refused. And yet one can descry no alteration of circumstance which could rationally instruct so amazing a contrast.

It almost seems that Scrutton L.J. was conscious of this anomaly. He felt himself dispensed from facing it, however, by an assertion which, with the profoundest respect for the Lord Justice, I am quite unable to follow. "It is obvious," he says, "that the wreck or loss of a ship on which a seaman is serving will always happen before the date contemplated for the termination of his service." Why is it obvious I would ask? Is that the reason why the same condition was inserted in Merchant Shipping Act, 1894, s. 158? In a statute which applies to any voyage without reference to circumstances is there any greater likelihood that a ship will be lost on any one day of the voyage rather than on any other day? In the case even of the *Celtic* might not her foundering have *a priori* just as well happened off Liverpool on the 11th as off Queenstown on December 10th, 1928 ?

I regret that the Lord Justice, for a reason which seems to be no reason, felt dispensed from dealing with this matter. I should have been helped by his views upon it. All I can say, for want of any answer so far made, is that I see in this condition, and in the close correspondence both as to subject-matter and otherwise between s. 158 of 1894 and s. 1 of 1925 the strongest further indication that this Act of 1925 has no reference at all to such a claim as the respondent's.

My Lords, I find also in the second paragraph of the section indications pointing to the same conclusion. Note, on this view of the section, how neatly it fits into the scheme ; how appropriate for the decision of a Court of summary jurisdiction is the only question that can now arise before it. On proof by a seaman that his vessel was lost on the voyage, on production of the articles, and on further proof that he was in fact unemployed upon days included in the articles and within two months of the wreck, his case is established, and he is entitled to judgment, unless the owner can disprove his case by proof of such things personal to the seaman as Scrutton L.J. refers to, or by proof, to borrow the language of unemployment insurance, that he has not been genuinely seeking work. There is no room or occasion for proof of any special circumstance in relation to the ship, e.g., that if she had not been lost she would have been laid up, or sold to another owner or otherwise disposed of, or in relation to the seaman himself that he would have been or would not have been again engaged, at the same or a lower wage, in the same or in another position. It is to my mind not without significance that in the section there is neither directly nor indirectly any reference to these vague and indefinite considerations which, if the respondent's view of it is right, are vital to every such claim as he now makes.

But I do not further expand these considerations in a judgment already too long. I leave my analysis of the section at the point I have reached, content, so far as I am concerned, with the results attained.

Three things only will I add. First, as I read Slesser L.J.'s judgment, he arrives at the same conclusion as I have done by reliance primarily on the second paragraph of the section. I desire to say that for myself I doubt if I could have reached the same conclusion had I not been able to find the basic justification for it in the first paragraph, and I should also have distrusted its correctness, had it involved the placing of any qualification upon the words in the first paragraph "in respect of each day on which he is in fact unemployed." These words appear to me to be quite unambiguous, and they must, I think, in any true interpretation of the section have their ordinary meaning assigned to them.

Next, having reached the above conclusion without reference to the scheduled convention which it is the purpose of the Act of 1925 to give effect to, I would now inquire, merely as a matter of interest, whether the conclusion is or is not in accord with that convention. My Lords, I cannot doubt that it is in complete accord therewith. The difficulty in comparing the convention with the Act consists in the fact, already alluded to, that the draftsman has not transferred to the Act the words of the convention, but he has translated them into the technical language of the Merchant Shipping Acts. And if the Act be interpreted as I have sought to interpret it, his translation is to my mind in this matter entirely accurate. It seems to me clear that the "two months' wages" to which by art. 2 the "indemnity . . . . may be limited," are not two months taken out of the life of the seaman, but two months taken out of the "contract for service," where the unexpired term of that contract exceeds two months. I do not find any suggestion in the convention that the owner is to be made liable either at the contract rate of wages or any other rate for days of unemployment covered by no contract at all with himself.

If therefore the respondent's construction of the Act is to be accepted it means that Parliament, under no international obligation in that behalf, in a statute which contains no hint of any such intention, has gratuitously gone out of its way to impose on an owner a liability to a seaman for wages for which he has never contracted and, apart from the statute, is under no conceivable liability to pay. Nor is that all: for he is to have no return for the payments so to be made, and Parliament has chosen as the occasion for imposing upon him this liability (in relief, it would seem, if the respondent Comerford's case may be regarded as typical, of the Unemployment Insurance Fund to which he has already contributed) the moment when the owner is already confronted with the total loss of his ship.

My Lords, Parliament can of course do anything, and I hope that judicially I shall never be other than obedient to its directions, whatever, when they are clearly expressed, those directions may be. But I should as I conceive be rendering a disservice to Parliament if, without compelling words, I were to impute to it an enactment, which, as sought to be interpreted by the respondent, is as entirely discordant with legislative precedent as, in my judgment, it is opposed to good sense and fairness.

My Lords, I do not suggest that this Act of 1925 is clear. I do not suggest that s. 1 bears its meaning, as I have interpreted it, upon its sleeve. It yields up its secret only to the patient inquirer; its truth lies at the bottom of the well. It is obscure, it remains oblique, but it is not in the result ambiguous. The truth from the well is found, at the end of the search for it, to have been leaking out of the section itself all the time just as the truth, in the words of a learned judge we all have in remembrance, may leak out sometimes even from an affidavit.

My Lords, if the decision rested with me I would allow both appeals.

LORD TOMLIN (read by LORD THANKERTON). My Lords, the only question on these appeals is as to the construction of the Merchant Shipping (International Labour Conventions) Act, 1925, which I shall refer to as the Act of 1925.

At common law where a ship was lost on a voyage the seamen could recover nothing.

By s. 158 of the Merchant Shipping Act, 1894, it was enacted as follows: "158.—Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period."

On July 9, 1920, the general conference of the International Labour Organization of the League of Nations adopted a draft convention concerning unemployment indemnity for seamen in case of loss or foundering of their ship.

Art. 2 of the draft convention was in the following terms :—

"In every case of loss or foundering of any vessel the owner or person with whom the seaman has contracted for service on board the vessel shall pay to each seaman employed thereon an indemnity against unemployment resulting from such loss or foundering.

"This indemnity shall be paid for the days during which the seaman remains in fact unemployed at the same rate as the wages payable under the contract, but the total indemnity payable under this Convention to any one seaman may be limited to two months' wages."

The Act of 1925 is entitled "An Act to give effect to certain draft Conventions adopted by the International Labour Conference relating respectively to an unemployment indemnity for seamen in the case of loss or foundering of their ship" and other matters.

The preamble of the Act of 1925 recites the adoption of the conventions referred to in the title, and that such conventions contain the provisions set out in the Schedule to the Act. Art. 2 of the Convention of July 9, 1920, is included in the Schedule. The preamble further recites that it is expedient that for the purpose of giving effect to the draft conventions such provision should be made as is contained in the Act.

Sect. 1 of the Act of 1925 then enacts as follows :—

"1.—(1.) Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date.

(2.) A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day."

On October 29, 1928, the respondent in the first appeal was engaged by the appellants to serve on board the steamship *Croxteth Hall* as a quartermaster and able-bodied seaman at a wage of 9*l.* 10*s.* per month.

The articles under which the respondent was engaged were for a voyage of not exceeding two years' duration to any ports or places within the limits of 75 degrees north latitude and 60 degrees south latitude commencing and proceeding as mentioned in the articles and to end at such port in the United Kingdom or Continent of Europe (with Home Trade Limits) as might be required by the master.

On February 27, 1929, before the date contemplated in the articles for the end of the voyage and whilst proceeding homewards on her voyage from Antwerp to Middlesbrough the ship was wrecked off Flushing.

Had the ship proceeded on her voyage without accident she would have reached Middlesbrough not later than March 11, 1929. There the voyage would have ended and the crew would have been discharged from further service under the articles.

After the wreck the respondent was out of employment.

As the result of the judgments of the President and of the Court of Appeal (Slesser L.J. dissenting) the appellants have been ordered to pay two months' wages from the date of the wreck and to satisfy the judgment by paying to the Ministry of Labour the amount which the respondent received in

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respect of unemployment pay from the Labour Exchange and by paying the balance, if any, to the respondent.

The appellants contend that upon the true construction of the Act of 1925 the statutory right of the seaman to recover wages is not a right to two months' wages but only a right to wages till the time when the voyage would have terminated if there had been no wreck but not in any event more than two months' wages.

My Lords, to my mind s. 1 of the Act of 1925 upon which the question depends is free from ambiguity.

Under sub-s. 1, disregarding for the moment the words "subject to the provisions of this section," it seems to me that a seaman whose service by reason of the wreck or loss of his ship terminated before the date contemplated in the agreement of service can claim wages during two months from "such termination for each day on which he was in fact unemployed." But there is a qualification introduced by the words "subject to the provisions of this section." That qualification is to be found in sub-s. 2, and the effect of the sub-section in question is in my opinion to enable the shipowner to prove certain things which if proved will disentitle the seaman to all or some part of that which otherwise he would have taken under sub-s. 1.

I cannot find in any part of the section anything which introduces a cutting down of the two months' period by reference to the date at which but for the wreck or loss the service would have terminated.

Nor do I think that, assuming there is any divergence between the draft convention and the Act, it would be proper to resort to the draft convention for the purpose of giving to the section a meaning other than that which in my judgment is its natural meaning. Upon this view of the matter I think that prima facie the respondent, who has proved he was out of employment during the two months, was entitled to two months' wages from the wreck. Further, the appellants have not upon the evidence discharged the onus thrown on them by sub-s. 2 and the respondent's prima facie right has therefore not been displaced.

The facts in the second appeal do not in any respect material to the matters which have been argued before your Lordships' House differ from those in the first appeal.

In my opinion both appeals fail and should be dismissed.

LORD MACMILLAN (read by LORD THANKERTON). My Lords, I am unable to find in s. 1 of the Merchant Shipping (International Labour Conventions) Act, 1925, the ambiguity which is said to lurk in it, although counsel for the appellants sought diligently to persuade the House of its existence. It was suggested that it resided in the words "in fact unemployed" in sub-s. 1, which were said to be susceptible of meaning either "out of work generally" or "not employed under the aforesaid agreement of service," and it was argued that the use of the word "wages" to describe the payment to the seaman supported the latter reading, because the payment of wages connotes the existence of a contract of employment. In my view the words in question do not give rise to any such ambiguity. The uncompromising expression "in fact unemployed" seems to me to make it as precise as language can make it that the statute requires no more of the seaman than that he shall have been actually out of work on each day of the two months for which he claims.

It is no doubt true that where the language used by the Legislature presents a choice of two or more meanings equally tenable it is admissible within certain limits to have resort to the aid of extraneous considerations and certainly to the context of the statute itself in order to discover which meaning was most probably intended: see, e.g., *Victoria City* v. *Bishop of Vancouver Island* (1), per Lord Atkinson and authorities there cited. But the terms of the statute in the present case offer no such choice to my mind and only a sophisticated reading could import any ambiguity into them.

The object of representing the sub-section to be ambiguous, as your Lordships were frankly told, was to pray in aid of its interpretation the language of the preamble and of the

(1) [1921] 2 A. C. 384, 387, 388.

scheduled Convention to give effect to which the statute bears to have been enacted. But if it were legitimate or necessary to go outside the terms of the sub-section and resort to these aids I do not think that they assist the appellants' case. For the word "indemnity" which both in the preamble and in the Convention is used to describe the payment to the seaman and which was specially relied on by the appellants is certainly not applicable in its technical sense to the benefit which sub-s. 1 confers on the shipwrecked mariner. If he has signed on for a six months' voyage and the vessel is wrecked at the end of the first month he will not receive five months' wages but a maximum of two months' wages, which may be an arbitrary compensatory payment but is not an indemnity.

The judgment of Slesser L.J., who dissented in the Court of Appeal, approaches the question through the second sub-section. If I follow his reasoning, the learned Lord Justice holds that, if the owner shows that any days included in the two months' claim are beyond the date on which the seaman's contract of employment would have terminated if there had been no wreck and the voyage had reached its natural end, then in law his unemployment during such days cannot be said to be "due to the wreck or loss of the ship." Hence the words "in fact unemployed" in sub-s. 1 must be read as meaning "unemployed during what would have been the currency of the seaman's contract of employment subsisting at the time of the wreck had it not been frustrated by the occurrence of the wreck." With all respect to the learned Lord Justice I doubt the soundness of his reasoning. Sub-s. 2 qualifies the right of the seaman to two months' wages conferred by sub-s. 1 "subject to the provisions of this section," by affording the shipowner two forms of defence to a claim for two months' wages. The first defence, on which Slesser L.J. relies, permits the shipowner to escape liability if he can show, the onus being on him, that the unemployment which the seaman has in fact experienced "was not due to the wreck or loss of the ship." If the shipowner had been permitted to avoid liability by showing

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that the unemployment was not due to the premature termination of the seaman's service the argument might perhaps have had more force. But I am by no means satisfied, having regard to the common practice of re-engaging seamen for successive voyages in the same ship, that the Legislature intended that no unemployment extending in time beyond the date of the natural expiry of the frustrated contract would be regarded as "due to the wreck or loss of the ship." By the wreck of his ship the seaman is disappointed of the prospect of re-engagement for her next voyage, which in the ordinary case he may reasonably entertain, and must set about finding a new ship on which to serve, which may not always be easy. It may well be that this was in the view of the Legislature when the arbitrary limit of two months was fixed, irrespective of the date on which the contract current at the date of the wreck would in any case have expired.

The facts in the case of the appeal relating to the steamship *Celtic* do not differ from those in the case of the appeal relating to the steamship *Crosby Hall* in any respect material to the question argued at your Lordships' bar and I concur in the motion that both appeals be dismissed with costs here and below.

Viscount Dunedin. My Lords, my noble and learned friend Lord Warrington of Clyffe authorizes me to state that he concurs in the opinion I have delivered.

In each case:—

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 9, 1930.

Solicitors for the appellants in each case: *Hill, Dickinson & Co.*, London and Liverpool.

Solicitors for the respondent Murray: *Pattinson & Brewer*, for *G. J. Lynskey & Son*, Liverpool.

Solicitor for the respondent Comerford: *Alexander Smith*, for *D. H. Mace*, Liverpool.

[HOUSE OF LORDS.]

MOON . . . . APPELLANT

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AND

LONDON COUNTY COUNCIL . . . . RESPONDENTS.

POTTERIES ELECTRIC TRACTION COMPANY, LIMITED . . . . . APPELLANTS;

AND

BAILEY . . . . RESPONDENT.

Rating—Derating—Industrial Hereditament—Ticket Printing Works for Tramway Undertaking—Omnibus Repair Works—Rating and Valuation, (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-ss.* 1 *and* 2.

By s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928: "In this Act the expression 'industrial hereditament' means a hereditament . . . . occupied and used . . . . , subject as hereinafter provided, as a factory or workshop; Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used" for the purposes enumerated in clauses (*a*) to (*e*) or "(*f*) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop." By sub-s. 2: "For the purposes of this Act, any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or workshop, but save as aforesaid, the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

In determining whether a hereditament occupied and used as a factory is primarily occupied and used for purposes which are not those of a factory it is the actual use to which the hereditament itself is put that has to be considered, and not the use to be made of the products of the hereditament or of the work there carried on.

The owners of a tramway undertaking occupied certain printing offices and works used exclusively for the printing of tramway tickets and other matter required for the purposes of their undertaking.

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, and LORD THANKERTON.

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The hereditament in question was a factory within the Factory and Workshop Act, 1901 :—

Held, that the hereditament was not primarily occupied and used for purposes which were not those of a factory or workshop and was therefore an industrial hereditament.

Inland Revenue v. *Donaldson & Co.* 1930 S. C. 348; *White Horse Distillers, Ld.* v. *Inland Revenue* 1930 S. C. 426; *Inland Revenue* v. *M'Intyre & Co.* 1930 S. C. 465; *Inland Revenue* v. *Melville, Dundas & Whitson* 1930 S. C. 477; and *Inland Revenue* v. *Currie & Co., Ld.* 1930 S. C. 513 considered.

Decision of the Court of Appeal affirmed.

An omnibus company operating a fleet of motor omnibuses occupied and used a hereditament, so far as material to the present appeal, for the manufacture of spare parts for the fleet and for other manufacturing and repair processes distinct from ordinary maintenance in connection with the fleet. The hereditament was registered as a factory :—

Held, (1.) that the hereditament was not occupied and used for purposes which were not those of a factory or workshop; (2.) that the manufacture of an article needed to maintain differed from "maintenance" as used in s. 3, sub-s. 2, and that the hereditament, except as to one part thereof used as a paint shop, was a factory within the meaning of the sub-section and was an industrial hereditament.

Decision of the Court of Appeal reversed.

MOON *v.* LONDON COUNTY COUNCIL.

THE respondents, as owners and occupiers of a hereditament known as 51 and 53 Effra Road in the Metropolitan Borough of Lambeth claimed under the Rating and Valuation (Apportionment) Act, 1928, that the hereditament should be entered in the Special List as an industrial hereditament.

The facts are stated in the opinion of Lord Buckmaster and are summarized in the headnote.

The Assessment Committee allowed the claim. The Court of Quarter Sessions for the County of London affirmed the decision of the Assessment Committee, but stated a Special Case for the opinion of the King's Bench Division.

The Divisional Court (Avory, Talbot and Finlay JJ.) set aside the order of the Court of Quarter Sessions and gave judgment in favour of the appellant, the Revenue Officer for the Lambeth Assessment Area.

The Court of Appeal (Scrutton, Greer and Slesser L.JJ.) reversed the order of the Divisional Court and restored the order of the Court of Quarter Sessions. The Revenue Officer appealed.

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1930. Nov. 24, 25. *Sir William Jowitt A.-G.* and *Wilfrid Lewis* (with them *Colin Pearson*) for the appellant. This hereditament is not an industrial hereditament within s. 3 of the Rating and Valuation (Apportionment) Act, 1928, by reason of the fact that it is primarily occupied and used for the purposes of a public tramway undertaking, which are not the purposes of a factory or workshop. Primary purpose is used as distinguished from ancillary. The primary purpose of the user was the carrying on of the tramway undertaking, and the printing of tickets was merely ancillary to that purpose. In determining the purposes for which the hereditament is primarily occupied and used the Court must consider not only the actual user occupation, but the ulterior purposes of that user. If the only relevant consideration was the actual user that could have been expressed in far simpler language. " For the purposes of " means something more than " as."

[They referred to *Inland Revenue* v. *Donaldson & Co.* (1); *White Horse Distillers, Ld.* v. *Inland Revenue* (2); *Inland Revenue* v. *M'Intyre & Co.* (3); *Inland Revenue* v. *Melville, Dundas & Whitson* (4); *Inland Revenue* v. *Currie & Co., Ld.* (5); *Inland Revenue* v. *Clan Line Steamers, Ld.* (6); *Nash* v. *Hollinshead.* (7)]

Konstam K.C. and *Michael Rowe* for the respondents were not called on.

The House took time for consideration.

POTTERIES ELECTRIC TRACTION COMPANY, LIMITED *v.* BAILEY.

Appeal from an order of the Court of Appeal affirming an order of the King's Bench Division made upon a Special Case stated by the Court of Quarter Sessions for the County Borough of Stoke-on-Trent whereby the order of the Court of Quarter Sessions was quashed.

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(1) 1930 S. C. 348.
(2) 1930 S. C. 426.
(3) 1930 S. C. 465.
(4) 1930 S. C. 477.
(5) 1930 S. C. 513.
(6) 1930 S. C. 445.
(7) [1901] 1 K. B. 700.

The appellants operated a fleet of 198 motor omnibuses and they occupied a hereditament in Bowstead Street, Stoke-on-Trent, which they used, so far as material to the present appeal, as omnibus workshops for the fleet, as hereinafter described.

The Stoke-on-Trent Assessment Committee decided to include this hereditament as an industrial hereditament in the Special List for the borough. The Court of Quarter Sessions for the borough affirmed the decision of the Assessment Committee, but upon the application of the respondent, the Revenue Officer for the Stoke-on-Trent Assessment Area, stated a Special Case for the opinion of the King's Bench Division.

The facts found by the Special Case, so far as material, were as follows :—

The hereditament in question was occupied and used by the appellants

(*a*) in part as a garage for thirty-six of their motor omnibuses ; and

(*b*) for the manufacture of spare parts for the fleet and other manufacturing and repair processes distinct from the work of ordinary maintenance (which was carried out on other premises occupied by the appellants) in connection with the fleet. Any new parts required in the course of ordinary maintenance were also manufactured upon this hereditament.

(*c*) The appellants also occasionally sold parts manufactured on the hereditament to other omnibus proprietors, but such sales were negligible.

The hereditament (apart from the garage and certain other parts which it was not claimed were occupied and used for industrial purposes) comprised an electrical workshop, electrical welding shop, paint shop, large machine shop, blacksmiths' shop, gauge template and tool room, body-building and wood-working shop, workshop stores, and armature tinsmith's and upholstery shop.

The equipment of the several workshops and the processes carried on therein were described in great detail in para. 8 (iv.) of the Case.

The paint shop was used for painting omnibuses, lorries and cars and all new wood-work produced in the body-building and wood-working shop. In the large machine shop a large variety of spare parts were manufactured and, in addition, a number of repair processes, which were additional to ordinary maintenance, were carried out in this shop. Other spare parts were made in the blacksmith's shop and in the armature tinsmith's and upholstery shop, and in the latter shop also a number of repair processes, which were additional to ordinary maintenance, were carried out. The body-building and wood-working shop was used for the rebuilding of omnibus bodies and the manufacture of a variety of articles, including (inter alia) parcels trucks, office furniture, patterns for castings and seats for omnibuses. The hereditament was registered under the Factory and Workshop Acts, 1901–1920.

If the occupiers did not themselves manufacture the parts and carry out the processes referred to in para. 8 (iv.) of the Case they would have had to purchase the said parts from and have the said processes carried out by manufacturers at prices far higher than the present cost to them.

The Divisional Court (Lord Hewart C.J., Avory and Branson JJ.) reversed the decision of the Court of Quarter Sessions on the ground that the hereditament was primarily used for the omnibus undertaking and was therefore not an industrial hereditament within the meaning of the Act.

The Court of Appeal (Scrutton, Greer and Slesser L.JJ.) disagreed with the reasoning of the Divisional Court, but affirmed their decision on the ground that the hereditament was used for the maintenance of the omnibuses within s. 3, sub-s. 2, of the Act.

1930. Nov. 25. *Pritt K.C.* and *Sydney Turner* for the appellants. This hereditament, so far as material to the present appeal, is not used for housing and is not used for maintenance, but is used for making spare parts with a view to maintenance. Maintenance should be construed with housing. If the ulterior purpose cannot be looked at under s. 3, sub-s. 1 (*f*), it cannot be looked at under s. 3, sub-s. 2.

[They referred to *Lewis* v. *Gilbertson & Co., Ld.* (1)]

Wilfrid Lewis (*Sir William Jowitt A.-G.* and *Colin Pearson* with him) for the respondent. The Court of Appeal were right in saying that all these processes were maintenance. The paint shop was clearly used for maintenance. The only thing that makes this hereditament a factory is the work of repair, and that comes out as falling under the head of maintenance. The Act does not distinguish between ordinary maintenance and any other kind of maintenance.

Pritt K.C. was called on to reply as to the paint shop only.

The House took time for consideration.

1930. Dec. 15. LORD BUCKMASTER. My Lords, the Rating and Valuation (Apportionment) Act, 1928, has for its purpose the separation of certain classes of hereditaments into independent portions of the Valuation Lists. To such classes it was intended wholly or partially to grant relief from the burden of local taxation for the purpose of restoring industry. Whether this purpose will be achieved time alone can tell. The immediate effect appears to have been the relief of a depressed profession. Upwards of 18,000 appeals are said to be pending to Quarter Sessions and 800 from Quarter Sessions to the Divisional Court, and we have been asked to take this case without delay in order that the plague of litigation may be stayed.

The circumstances which have given rise to this particular appeal can be summarized in a few sentences. The London County Council own and occupy certain offices and printing works 51-53 Effra Road. Such premises are indisputably a factory within the literal words of the Factory and Workshop Act, 1901, under which by s. 6, Part I., there is included under the definition of factory "letterpress printing works, that is to say, premises in which the process of letterpress printing is carried on." The London County Council also own a tramway undertaking and the printing and preparation of tickets, fare bills, notices, posters and forms in connection therewith are all carried out upon the premises 51–53 Effra Road. No printing of tickets and no other work is carried on for third parties. In these circumstances the London County Council claimed to have the premises in question set apart and distinguished under s. 1 of the statute as an industrial hereditament, and a draft Special List was prepared by the Assessment Committee so including them. To this the Revenue Officer objected and appealed to Quarter Sessions, who dismissed the appeal. The order of Quarter Sessions was appealed to the Divisional Court, who directed that it should be quashed, and that judgment should be entered for the Revenue Officer. This judgment was again appealed to the Court of Appeal, who restored the order of the Court of Quarter Sessions and their judgment has been appealed to this House.

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(1) (1904) 91 L. T. 377, 379.

The above statement is sufficient to show that the question is whether the London County Council is entitled to the benefit of certain statutory provisions, and it follows that the construction of the Act of Parliament is the only thing that is in issue. As an aid to this construction the preamble to the Act is not without value and may be examined: see *Fielden* v. *Morley Corporation.* (1) It is as follows: "An Act to make provision, with a view to the grant of relief from rates in respect of certain classes of hereditaments, for the distinction in Valuation Lists of the classes of hereditaments to be affected and the apportionment in Valuation Lists of the net annual values of such hereditaments according to the extent of the user thereof for various purposes."

It then provides by s. 1 that three classes of hereditaments, agricultural hereditaments, industrial hereditaments and freight transport hereditaments are to be distinguished from each other and from all other hereditaments. We are only concerned with industrial hereditaments. The provisions relating to these are to be found in s. 3. This, omitting all that is not material for the present purpose, runs as follows:

"Section 3 (1.) In this Act the expression 'industrial hereditament' means a hereditament occupied and used . . . . subject as hereinafter provided, as a factory or workshop.

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(1) [1899] 1 Ch. 1, where the name is wrongly given as Fielding; see the report on appeal to H. L. [1900] A. C. 133.

Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say—

(*a*) the purposes of a dwelling-house;

(*b*) the purposes of a retail shop;

(*c*) the purposes of distributive wholesale business;

(*d*) purposes of storage;

(*e*) the purposes of a public supply undertaking;

(*f*) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

By sub-s. 2 the expressions "factory" and "workshop" are declared to have the same meanings as in the Factory and Workshop Acts, 1901–20. The hereditament in question of the London County Council comes therefore within the provisions of sub-s. 1 unless excluded under its later words.

The argument in support of its exclusion which the appellants urge is that the purpose of the printing is not that of the manufacture and supply of tickets to any who wish to buy, but that it is merely a branch of and ancillary to the tramway undertaking of the London County Council, and therefore that its purpose is not that of a factory or workshop. This argument depends, and all the arguments that have been addressed in the many cases that have already arisen depend, upon the assumption that in order to ascertain what are the purposes referred to in the Act, "which are not those of a factory or workshop," it is permissible to inquire not as to the purpose for which the premises are used, but the purpose to which the goods that they produce are to be applied. I cannot accept this contention. It appears to me that running through the statute is the idea of exempting particular premises described throughout as hereditaments and that it is the use to which those premises are put that must be considered and not what may be ultimately done with whatever commodity they create. Examination of the earlier branches of the section which were relied upon by the Revenue to my mind only strengthens the view I have expressed. If you want to see whether the hereditament is used for the purposes of a dwelling-house, you examine what takes place within the boundaries in which that hereditament is confined. So again for the purposes of a retail shop. The retail shop is to be found upon the hereditament itself and not elsewhere, for were it otherwise every manufacture of goods which ultimately find their way into the hands of the public through the channel of retail dealing would be robbed of the benefit of the Act, and, as Scrutton L.J. has pointed out, the Act would become a nullity. Sub-s. (*c*) is, in my opinion, the same thing; although the hereditament is a factory and workshop, if it is primarily occupied for a distributing wholesale business it is outside the purpose of the statute, and so again with regard to storage. The purposes of a public supply undertaking are slightly different, as the actual examination of the premises might not enable the question to be determined, but when once it was resolved to exclude a public supply undertaking the meaning is plain. When therefore we come to sub-s. 1 (*f*) it is necessary to look at the premises and see what are "the other purposes" for which the hereditament is alleged to be occupied and used. If it be found that, notwithstanding the fact that the hereditament may come within the definition of a factory and workshop, it is primarily occupied and used for other purposes, it cannot get the benefit of the statute. In other words a hereditament primarily occupied and used for purposes which are not those of trade or factory cannot take advantage of the fact that a trade and factory is there carried on, so that the premises might be regarded as a factory under the Factory Acts and by this means obtain the benefit of the statute. In cases where both uses are made of the premises and they are not "primarily used" for any of the named purposes, s. 4, sub-s. 1, shows how in such a case annual value can be apportioned between the user for industrial purposes and those outside. Many authorities were referred to and in but a few of them was any help to be obtained. In the case of the *Inland Revenue* v. *Donaldson & Co.* (1) the benefit of the Act was

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(1) 1930 S. C. 348.

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refused to people upon the ground that the hereditament was primarily used for the purposes of storage and also of a distributive wholesale business. In the case of the *White Horse Distillers, Ld.* v. *Inland Revenue* (1) a hereditament was occupied by a whisky company where their packing cases were repaired and repainted, and bottles were washed. It was argued that they were not entitled to exemption because the processes were not carried on by way of trade or for purposes of gain, and this was accepted by the valuation committee, but was definitely rejected by Lord Sands, though the determination of the committee was held to be right upon grounds not material for the present purpose.

In the case of the *Inland Revenue* v. *M'Intyre & Co.* (2) the hereditament was used by a firm of plasterers in connection with their business and contained a store for tools and material, a garage and an office. A certain amount of manufacturing of slabs was done, the greater part of which were used in connection with the firm's own business, the remainder being sold. It was held that they were not industrial lands and heritages. So far as the decision depended upon the fact that the premises were an ordinary plasterers' yard, which appears to have been Lord Sands' view, it would not be open to question, and the fact that there were no findings showing the extent to which the premises were used for manufacturing purposes robs the decision of any real relevance. But so far as there underlies the judgment the idea that the manufacture upon the premises of slabs for the company's use prevented it from being an industrial hereditament, I do not think the decision was sound.

In the case of the *Inland Revenue* v. *Melville, Dundas & Whitson* (3) a public works contractor occupied premises where the contractors did a large amount of building work in making reinforced concrete, and also for overhauling their plant. The argument there certainly raised a point similar to that in the present case, for it was argued that the premises were not a factory or workshop because the work

(1) 1930 S. C. 426.
(2) 1930 S. C. 465.
(3) 1930 S. C. 477.

done was not by way of trade or for purposes of gain, but was merely ancillary to contracting work done elsewhere. Lord Hunter, in declaring that the premises were not entitled to be separately entered, said that "what is done by way of manufacture is not done with a view to producing a separate entity," by which I understand him to mean separate trade or business apart from the general work of the public works contractors. With that opinion I cannot agree. It is quite easy to see how on other grounds the decision was reached, but upon the facts found it would appear that the premises ought to have been divided up, the storage exempted from the provisions of the Act, and also the garage, while the work in constructing the concrete, the steel bars and similar work would appear to be work entitling the hereditament to be described as an industrial hereditament in the meaning of the Act.

The case of the *Inland Revenue* v. *Currie & Co., Ld.* (1), was a case where certain cement merchants occupied premises used for the making of asphalt for use on outside contracts. The valuation committee held they ought to be derated. This decision was overruled by the Court of Session, but I am unable to agree with their conclusion. Lord Hunter says that the occupiers did not directly deal in the sale of asphalt, but used asphalt in connection with the completion of outside contracts. If this be the foundation of the judgment it is contrary to the opinion that I have expressed as to the true construction of the statute. Lord Sands, however, did think that the premises ought not to be registered as a factory at all. If that were so the matter would not, for another and a perfectly valid reason, have been within the earlier provisions of s. 3, and the question as to whether they were taken out of it by the subsequent reservation would not arise.

My Lords, the whole difference of opinion upon this Act resolves itself into the proposition which I stated in an earlier period of this opinion. Can you, for the purpose of determining whether a hereditament is primarily occupied and

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(1) 1930 S. C. 513.

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used for purposes which are not those of a factory or workshop, consider not merely the actual indisputable use of the premises themselves, but the use that is going to be made of the work done on the premises ?

I am clearly of opinion that this cannot be done. Throughout the whole statute it is the hereditament that has to be examined. It is the use to which the hereditament is put that determines whether it is a factory or a workshop, and it is again the use to which the hereditament is put that determines whether its primary occupation is for other purposes.

My Lords, in the case of the Potteries Electric Traction Company, Ld., the appellants own and operate a fleet of 198 motor omnibuses and they occupy a hereditament described as a tram depot power station, etc., situate in the borough of Stoke-on-Trent. The use to which the premises are put is stated in the Special Case to be as follows :—

(*a*) in part as a garage for thirty-six of the said motor omnibuses ; and

(*b*) for the manufacture of spare parts for the said fleet, and other manufacturing and repair processes distinct from the work of ordinary maintenance (which is carried out on other premises occupied by the respondent occupiers) in connection with the said fleet. Any new parts required in the course of ordinary maintenance are also manufactured upon the said hereditament.

(*c*) The respondents also occasionally sell parts manufactured on the said hereditament to other omnibus proprietors but such sales are negligible.

No question arises as to the garage or the stores, but that part of the premises which is marked pink upon the plan is said not to be an industrial hereditament within the meaning of the statute and not entitled to be so entered in the Valuation List.

The Assessment Committee decided that the said hereditament should be so entered and an appeal by the Revenue Officer was dismissed by Quarter Sessions. The King's

Bench Division quashed the order of Quarter Sessions and the Court of Appeal affirmed their judgment.

So far as this case depends upon the fact that the work done upon the premises is done for the purpose of being used in the business of the people who own and occupy the premises, it has already been dealt with, but another consideration arises under sub-s. 2 of s. 3 which has not hitherto been considered. It is as follows: "(2.) For the purposes of this Act any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or workshop, but save as aforesaid, the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

It is said that these hereditaments are used for maintenance of the road vehicles, and accordingly that they are disentitled to the benefit of the statute. I find myself unable to accept this view having regard to the findings in the Special Case. The fact that spare parts are necessary for repairing omnibuses does not, in my opinion, make the manufacture of the spare parts a maintenance of the omnibus within the meaning of the statute. The processes carried out are distinctly held in the Special Case to be processes that are additional to ordinary maintenance. I think the word maintenance is a word sufficiently well known in this connection to entitle us to rely upon the special finding of the fact in the Case. The finding that the work done in the manufacture of all the various articles specified, every one of which, as found in the Case, would have to be purchased by the appellants, if not made upon their own premises, shows that in substance the work carried on is the work of the manufacture of a large number of articles incident to the construction and the maintenance of a fleet of omnibuses. But the construction of an article needed to maintain differs in my opinion from what is meant by the word maintenance and, as already decided, it is the purpose to which the premises are put and

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not the purpose to which their products are devoted that is the question to be regarded. There is, however, one part of the building that is specially used for a purpose that obviously may be that of maintenance. It is that part which is devoted to the painting of omnibuses. It was urged by the appellants that there was nothing to show how much of this painting was done by way of repair and how much is original work, but in the workshops of an omnibus company owning a fleet of 198 omnibuses there must be constant repainting required, and I think it is safe to assume that this part of the hereditament is devoted to that object and not entitled to the benefit of relief. It would be impossible further to elaborate the matter without sending the case back, and this quite rightly and properly the appellants' counsel did not ask us to do. Except therefore so far as the premises marked on the plan and there stated to be used as a paint shop, this appeal succeeds.

VISCOUNT DUNEDIN. My Lords, these cases have come before your Lordships raising a point of very general application in the construction of the Derating Act as to which there has been a difference of opinion between the Divisional Court and the Court of Appeal. In the second of the cases there is a special point not of such general application which I shall separately deal with. It will be expedient, for clearness' sake, to begin with the facts of the first case, the London County Council case, which are exceedingly simple, there being no controversy as to them between the two parties.

The County Council are owners and occupiers of a hereditament known as 51 and 53 Effra Road. The said hereditament is occupied and used as a printing establishment where are printed tickets and other printed matter for use on the Council's system of tramways. The tramway undertaking occupies an entirely separate hereditament. The County Council claimed that the hereditament in Effra Road should be placed on the Special List as an industrial hereditament. This was opposed by the appellant, the Revenue Officer for the Lambeth Assessment Area. The Assessment Committee entered the hereditament on the List, it having been omitted by the rating authority. The Court of Quarter Sessions, on appeal, confirmed this judgment. They stated a Special Case for the opinion of the King's Bench Division. The Divisional Court allowed the appeal and removed the name from the List. Appeal being taken to the Court of Appeal, they reversed the judgment of the Divisional Court and restored the judgment of the Court of Quarter Sessions. From this judgment of the Court of Appeal the present appeal is taken to your Lordships.

I now turn to the Act, being the Rating and Valuation (Apportionment) Act, 1928. The scheme of the Act seems to me remarkably clear. Taken in conjunction with the following Act it was, as set forth in the preamble, to give a certain relief from rates to certain classes of hereditaments by exempting, to a certain extent, what were to be, in the terms of the Act, agricultural, industrial or freight transport hereditaments. This brings me straight to the section on which the question for us turns, it being understood that we have here to do with an industrial hereditament.

Sect. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, provides as follows :—

"In this Act the expression 'industrial hereditament' means a hereditament (not being a freight transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop.

Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say :—

(*a*) the purposes of a dwelling-house ;
(*b*) the purposes of a retail shop ;
(*c*) the purposes of distributive wholesale business ;
(*d*) purposes of storage ;
(*e*) the purposes of a public supply undertaking ;
(*f*) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

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Now the first thing that a person making a claim to have his hereditament included in the Special List must show is that the hereditament is a factory or workshop. In order to do that he must go to the Factory and Workshop Acts which define various ways in which the character of a factory or workshop can be obtained. In the present case the hereditament is a factory, because it is a printing works and printing works are one of the works enumerated in Schedule VI. of the Act of 1901 which, under the head "Factory and Workshop" puts "letterpress printing works, that is to say, any premises on which the process of printing is carried on." The claimant has now got so far on his way, but, though he has shown that the hereditament is a factory, it may still be that it is not entitled to be called an industrial hereditament, because it may be struck at by the terms of the proviso. Now I go to the proviso, but before doing so I remark that if once the hereditament is qualified as a factory or workshop by direct description that part of the inquiry is ended and a discussion, such as was raised in some of the learned judges' judgments in the Courts of Appeal, whether the factory is carried on for gain or not, and the citation of such a case as *Nash* v. *Hollinshead* (1), a case which was brought to settle whether a particular place where a workman was working when injured was or was not a factory, are quite beside the mark and irrelevant. Now, as to the proviso, the reasons for it are, I think, plain. Once the term "factory or workshop" (I shall not go on repeating the double term) is given, the whole hereditament obtains that character. A workman injured in any part of the hereditament, however removed from where the machinery was, would, under the old law, before it was swallowed up under the wider provisions of the Workmen's Compensation Acts, have obtained relief. But it was not wished to extend this rating benefit to a hereditament which, although it was called a factory, yet was not primarily, and that, I take it, is equivalent to "mainly," used for factory purposes. To do so when the factory engaged but a small portion of the hereditament would be to give relief little in

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keeping with the true industrial tenement sought to be relieved. Accordingly, you have enumeration of various things which are not factory operations. But be it observed that in each and all of the sentences, (*a*) (*b*), etc., the nominative is a hereditament which is described as being used and occupied primarily for a specific purpose which is not a factory purpose. Obviously part of the hereditament is a factory, but the portion occupied for the other purposes is in contradistinction to the portion occupied for factory purposes, and the question is—Which is primarily or most occupied ? In other words, the whole hereditament is being considered, for upon that whole the relief would necessarily be calculated, in order to see whether it is used and occupied primarily or mainly for non-factory purposes, in which case the privilege is not accorded. The truth is that "for the purposes of" might perfectly well be expressed by the one little word "as." All this has nothing to do and could have nothing to do with the product of the factory itself. That is, of course, quite apparent in the earlier sentences. No factory makes dwelling-houses, retail or wholesale shops, or storage. But the Court of Appeal has gone on the terms of the last sentence (*f*) "any other purposes which are not those of a factory or workshop." To my mind, the use of this sub-section is clear. The earlier ones do describe various uses to which the parts of the area not actually used by the factory might be put. Then comes this sub-division, which is put in to cover anything that might be omitted by reason of the antecedent paragraphs containing specific descriptions and includes purposes which, though not specifically similar to those already specified, yet resemble them in this, that they are not mainly factory purposes. But to suddenly change the whole scheme, no longer to consider how the area is occupied except in so far as it is occupied by the factory, but to bring in the question of whether the product of the factory is for the purpose of being used by something which was not a factory is, to my mind, and with deference to the learned judges who have so thought, quite fantastic. Its operation would defeat the whole scheme of the Act, and

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all this is to be drawn out of the word "purpose." Here I must deal with an argument pressed by the learned Attorney-General, who said that if the meaning was the meaning given by the Court of Appeal the section might have been much more simply expressed. I agree. I have already said that the word "as" would do just as well as "for the purposes of." It is true that sometimes in considering an Act of Parliament when it is very difficult to find a meaning it is legitimate as against one proffered meaning to say "That could have been more simply said in other words," but when there is no difficulty in finding a meaning, and here I find no difficulty, it is not legitimate to say "That meaning could have been more simply expressed and therefore you must seek not for the obvious meaning of the words used, but for some more recondite meaning which would differ from the simple one." The scheme of the Act as I have described it is most logically carried on in s. 4. If industrial hereditament had been made equivalent to factory the whole hereditament would have enjoyed the privilege. If the most part of it is used, not as a factory or, to use the exact words, if the hereditament is used primarily for non-factory purposes, the privilege is not obtained, but even if the privilege is obtained it may yet well be that much of the hereditament is not used for factory purposes and then, under the provisions of s. 4, there must be apportionment. A practical example of this is given in the second case. I am, therefore, clearly of opinion that in the first case the judgment of the Court of Appeal is right.

On the general question the second case is, in my opinion, ruled by the decision given in the first. The facts here are that the hereditament is used for the manufacture of spare parts for motor omnibuses, but part of it is used as a garage, and for certain other purposes. The whole judgment of the Divisional Court rests on the fallacious view that the ultimate fate of the product of the factory rules the question of what are the purposes for which the hereditament is primarily occupied. This is quite an illustrative case, because much of the hereditament was occupied for purposes which were obviously not factory purposes, e.g., as a garage, and these portions have been apportioned, under s. 4, with the portions occupied as a factory, as shown on a plan produced; but the Divisional Court, on the main question, found that the hereditament was occupied primarily for non-factory purposes on the ground that the factory was used to make spare parts which were used not for sale but for employment in repairing the occupier's own fleet of omnibuses. This is again a case of judging the purpose by the use of the product and accordingly shares the fate of the previous case. There was, however, a particular question which arose in this case. Sect. 3, sub-s. 2, says: "For the purposes of this Act any place used by the occupier for the housing or maintenance of his road vehicles, or as stables, shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or workshop, ..." Now the Court of Appeal held that, inasmuch as the spare parts manufactured in the factory were used for the omnibus fleet, this was a case in which the place was used for the "maintenance" of road vehicles. I cannot assent to this. Maintenance is taken along with housing, and points, I think, to something done to the vehicle on the premises. It is really the same story over again. The ultimate fate of the part made is to maintain a vehicle. That does not show that maintenance is done on the hereditament. While this is so, and displaces the view of the Court of Appeal, we have been driven to look for ourselves at the account given of the premises in the Special Case and if that is looked at it seems pretty clear that the painting shop is used for the purpose of real maintenance. I am therefore of opinion that, following the severance pointed at in s. 3, sub-s. 2, the painting shop ought to be transferred from the pink on the plan to the green, i.e., that part of the hereditament which is non-industrial.

I have now dealt with both cases, but there are two other matters which I think I should be wrong not to mention. The first is that the judgment of the Court of Appeal was

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given after the hearing of seventeen cases and there are, accordingly, in that judgment many remarks as to other questions arising under the Act which did not touch this case. I have studiously refrained from making any comment on such observations, because I think it most inexpedient under the head of general observations to prejudice questions which may arise and come before us on other appeals. The second is in regard to certain observations by Greer L.J. as to the burden of proof. I cannot help thinking that these observations may be misunderstood. I am not canvassing his view as to what must be legally proved for the privilege of getting the hereditament on the Special List, for I agree with it; but I say unhesitatingly that if the occupier of the hereditament proves that it is a factory in any of the ways in which that can be done, it is quite enough for him to say "My hereditament is not occupied primarily for any of the purposes specified in the sub-sections" and then to rest content, leaving it for the Revenue Officer either to elicit by cross-examination or to prove by independent witnesses that his answer was a mistaken one. What I am afraid of in the Lord Justice's remarks is that it might be thought that it was necessary for the occupier to produce independent witnesses to go over the various sub-sections of the Act and be asked: "Did you find that the hereditament was not mainly occupied as a dwelling-house, as a store?" etc., etc. In my view such a proceeding would be quite unnecessary.

LORD WARRINGTON OF CLYFFE (read by LORD THANKERTON). My Lords, this is an appeal by the Revenue Officer from an order of the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) dated July 11, 1930, allowing an appeal by the London County Council from an order of the King's Bench Division (Avory, Talbot and Finlay JJ.) whereby an appeal by the present appellant upon a case stated by the Court of Quarter Sessions was allowed and the decision of that Court was reversed.

The respondents are the occupiers of a certain hereditament in Effra Road, Lambeth, comprising printing shops used for printing tickets and other matter for use in connection with their tramway undertaking and certain offices and other rooms used for various purposes incidental to the printing works.

The hereditament is a factory—namely, " premises in which the process of letterpress printing is carried on " within the Factory and Workshop Acts, 1901 to 1920, and is registered as such.

The hereditament is occupied and used by the respondents solely in connection with their tramway undertaking and no printing of tickets or other work is carried on for third parties.

On these facts the Court of Quarter Sessions decided that the hereditament was an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, and ought to be included in the Special List accordingly, and this decision was ultimately affirmed by the Court of Appeal, as above stated.

The question turns upon the true construction and effect of s. 3 of the said Act of 1928 and in particular of the proviso to sub-s. 1 of that section. Shortly stated, it is whether the hereditament, though occupied and used as a factory or workshop, is primarily occupied and used for other purposes which are not those of a factory or workshop. [His Lordship then quoted s. 3, sub-s. 1.] It was admitted in argument before this House that unless the case could be brought within head (*f*) in the proviso the appeal will fail. I propose therefore to consider the construction and effect of the section in reference to that head of exception and to that alone, though of course a decision on the construction in reference to that head must in some respects affect the construction as to others.

It is contended on behalf of the appellant that the factory in this case is primarily occupied and used for other purposes not those of a factory because it is occupied and used for the production of printed matter to be used exclusively in connection with the tramway undertaking of the respondents. In my opinion this contention is based on a confusion between the purposes for which the hereditament itself is occupied and

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used and the purposes to which the products of that occupation and user are devoted.

It is, I think, reasonably clear that in this Act the purposes for which the hereditament itself is occupied and used and those alone determine the question whether it is an industrial hereditament or not. The words are "if it," that is to say, the hereditament occupied and used as a factory or workshop, is primarily used for another purpose. There is no suggestion here that the disposition of the product has any bearing on the question. Again the use of the word "primarily" suggests a comparison in the minds of the framers of the Act between classes of purposes for which the hereditaments may be used, some of which may be regarded as the main or substantial purposes and the others as secondary or subsidiary, but it is still the occupation and use of the hereditament itself the purposes of which are being considered. That this is the case is I think confirmed by s. 4, which provides for the apportionment of the annual value where the hereditament is used partly for industrial purposes and partly for other purposes. Nowhere is there the least indication—except possibly in reference to public supply undertakings (head (*e*)) —that the use made of the products of the factory affects the question. In the present case the hereditament itself is clearly used and used only as a factory and when that is the fact there is no ground for the application of the proviso. I prefer to express no opinion on the true construction of the exception under head (*e*). This will have to be dealt with when and if it arises. I would like to point out however that the purposes therein mentioned appear to stand in a category by themselves, inasmuch as, having regard to the definition of "Public Supply Undertaking" in the Act, the supply for particular purposes of the product of the hereditament is an essential characteristic of its use.

The appeal in my opinion fails and should be dismissed with costs.

My Lords, the case of the Potteries Electric Traction Company, Ld., is an appeal from an order of the Court of Appeal dated July 11, 1930, affirming an order of the King's

Bench Division dated April 15, 1930, whereby an order of the Court of Quarter Sessions for the County Borough of Stoke-on-Trent in favour of the present appellants was set aside.

The hereditament in question is occupied and used by the appellants in part as a garage for thirty-six out of their fleet of 198 motor omnibuses, and in part for the manufacture of spare parts and other manufacturing and repair processes distinct from ordinary maintenance (which is carried out on other premises occupied by the appellants) in connection with their fleet.

The part used as a garage and certain other parts coloured green in a plan marked C annexed to the Special Case are not claimed as an industrial hereditament. The remainder of the hereditament (coloured pink on the plan) was entered in the Special List as an industrial hereditament and this was confirmed by the order of the Court of Quarter Sessions. The question in this case is whether that order was correct in law.

The appeal raises two questions: (1.) the same question as that decided in *Moon* v. *The London County Council*; (2.) a minor point affecting as I think certain parts only of the hereditament but, in the view of the Court of Appeal, preventing any part from being an industrial hereditament.

As to the first point. The hereditament is unquestionably used and occupied as a factory and is an industrial hereditament unless it is primarily occupied and used for any of the purposes mentioned in s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928. The only material head of exception is (*f*). The Court of Appeal came to the same conclusion on this point as in the London County Council case. The two cases are in this respect indistinguishable and I agree with the Court of Appeal that but for the second point the appellants were entitled to have the order of Quarter Sessions upheld.

The second point raises a question as to the construction and effect of sub-s. 2 of s. 3 of the above mentioned Act. This is as follows: [His Lordship quoted the sub-section.] This provision appears plainly to contemplate the exclusion from a factory of certain parts not used for factory purposes, and (but for one very minor point to be mentioned hereafter) effect was given to it by excluding from the factory the portions coloured green on the plan. But the learned Lords Justices are of opinion that, inasmuch as the spare parts and the repair processes and other matters described in the Special Case were all in their opinion used and employed in the maintenance of the omnibuses, the whole of the works must be deemed not to form part of the factory and that the hereditament could not be treated as an industrial hereditament. With all respect I cannot agree with this view. With one minor exception to be mentioned presently the whole of the workshops and so forth described in the Special Case have been found to be used for purposes all of which are ordinary purposes of a factory. It is true the things made there are used in connection with appellants' fleet of omnibuses and are (except to a negligible degree) not supplied to the public, but, as already pointed out in the London County Council case, the purposes for which the products of a factory are used are not to be treated as purposes for which the factory itself is used. The Court of Appeal seem to me to have done under one sub-section what they have themselves held could not be done under the other.

In the Special Case the learned Recorder has carefully and elaborately described the work carried on in the several departments of the factory. He has found as a fact that the hereditament is occupied and used by the appellants for the manufacture of spare parts for the said fleet and other manufacturing and repair processes distinct from the work of ordinary maintenance (which is carried out on other premises occupied by the appellants) in connection with the said fleet. Any new parts required in the course of ordinary maintenance are also manufactured upon the said hereditament. He has also found that if the appellants did not themselves manufacture the parts and carry out the processes referred to in para. 8 (iv.) of the Special Case (being the detailed description above referred to of the work carried on in the several departments) they would have to purchase

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the said parts from, and have the said processes carried out by manufacturers at prices higher than the present cost to the appellants. With one small exception there is in my opinion nothing in the detailed description of the work which is inconsistent with the general conclusion of the learned Recorder. The exception is this: In his description of the paint shop he says it is used amongst other things for painting omnibuses, lorries and cars. This is, I think, a matter of ordinary maintenance and the paint shop should therefore have been excluded from the factory.

On the whole I think the appeal succeeds and the order appealed from together with the order of the King's Bench Division should be reversed, and, with the slight variation mentioned above the decision of the Court of Quarter Sessions should be restored. The variation is so small that I think it should not affect the costs. These both in this House and below should be paid by the respondent.

LORD TOMLIN. My Lords, the respondents own and operate a tramway undertaking. They are the occupiers of 51 and 53 Effra Road, Lambeth. They use these premises as printing works to print tram tickets, fare-bills and other matter required by them for the purposes of their tramway undertaking.

The premises in question are admittedly a factory within the Factory and Workshop Acts, 1901–1920. Sect. 149, sub-s. 1 (*a*), and the Sixth Schedule, Part I. (17.), of the Factory and Workshop Act, 1901, expressly include "Letter-press Printing Works" in the definition of non-textile factory.

The question on this appeal is whether the premises are "an industrial hereditament" within the meaning of the Rating and Valuation (Apportionment) Act, 1928 (which I will refer to as the Rating Act), so as to entitle the respondents to rating relief in respect thereof under s. 68 of the Local Government Act, 1929.

The Lambeth Assessment Committee included the premises in the Special List for the rating area of the metropolitan borough of Lambeth as an industrial hereditament.

The Revenue Officer for the Lambeth Assessment Area (who is the present appellant) appealed to the Court of Quarter Sessions. The appeal failed but a Special Case was stated for the opinion of a Divisional Court of the King's Bench Division.

That Court quashed the order of the Court of Quarter Sessions and directed judgment to be entered at Quarter Sessions for the present appellant with the result that the premises were ordered to be removed from the Special List.

On appeal taken to the Court of Appeal the decision of the Divisional Court was reversed and the premises were ordered to be restored to the Special List as an industrial hereditament.

Against that decision the Revenue Officer appeals to your Lordships' House.

Sect. 3 of the Rating Act so far as it is material is in the following terms :—

" 3.—(1.) In this Act the expression " industrial hereditament " means a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop ;

Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say :—

(*a*) the purposes of a dwelling-house ;

(*b*) the purposes of a retail shop ;

(*c*) the purposes of distributive wholesale business ;

(*d*) purposes of storage ;

(*e*) the purposes of a public supply undertaking ;

(*f*) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop.

(2.) For the purposes of this Act any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or workshop, but save as aforesaid, the expressions, "factory" and "workshop" have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

"(4.) In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say:—

"Public supply undertaking" means any undertaking primarily carried on for the supply of gas, water, electricity or hydraulic power for public purposes, or to members of the public, or to any one or more undertakings carried on under any Special Act or Order having the force of an Act.

"Retail shop" includes any premises of a similar character where retail trade or business (including repair work) is carried on."

"Mine" and "mineral railway" are also defined in the section but these definitions are immaterial for the purposes of the present case.

Sect. 4, sub-s. 1, of the Rating Act provides as follows:—
"4.—(1.) In every valuation list every industrial hereditament occupied and used wholly for industrial purposes shall be shown as being so occupied and used, and as respects every such hereditament occupied and used partly for industrial purposes, the net annual value thereof shall be shown, in the prescribed manner, as being apportioned between the occupation and user of the hereditament for industrial purposes, and the occupation and user thereof for other purposes."

A definition of a freight transport hereditament is contained in s. 5 of the Rating Act but the premises with which the present appeal is concerned are not within that definition.

Now in dealing with premises which are not a freight transport hereditament and which are not occupied and used as a mine or mineral railway the process prescribed by the Rating Acts for determining whether they are an industrial hereditament seems to be reasonably clear. First, it must be ascertained whether the hereditament is a factory or workshop within the meaning of the Factory and Workshop Acts, 1901–1920, regard being had to the provisions of sub-s. 2 of s. 3 of the Rating Act. If it is such a workshop or factory, then secondly, it must be ascertained whether it is taken out of the category of industrial hereditaments by the operation of the proviso in sub-s. 1 of s. 3 of the Rating Act.

It is by the application of the terms of this proviso properly construed to the facts of this case that this appeal must be determined.

It is said by the appellant, as I understand the argument, that there is a distinction to be drawn between the phrase "occupied and used as" and the phrase "occupied and used for the purposes of" and that the first relates to the physical occupation of the premises and the second to the ulterior purposes to which the products are applied with the result that it is necessary and permissible to consider what is done with the products of the factory or workshop in order to determine whether the factory or workshop is primarily occupied and used for any of the purposes mentioned in sub-clauses (*a*) to (*f*) of the proviso. The appellant further contends that if in fact, as in the present case, the products are not put upon the market for the purpose of direct gain but are only used by the occupier of the factory or workshop in connection with and as ancillary to some other undertaking or business which he is carrying on elsewhere the factory or workshop is then primarily occupied and used for a purpose which is not that of a factory or workshop and falls within sub-clause (*f*) of the proviso. He seeks to support his argument by reference to the decision in *Nash* v. *Hollinshead*. (1)

My Lords, this to my mind is erecting an over elaborate super-structure upon inadequate foundations.

The object of the proviso in sub-s. 1 of s. 3 of the Rating Act seems broadly speaking to be to exclude from the category of industrial hereditaments premises occupied and used in some way which taken alone would not constitute them a factory or workshop, although by reason of some ancillary machinery used or work done thereon the definition of a factory or workshop contained in the Factory Acts applies to them.

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(1) [1901] 1 K. B. 700.

An examination of the premises and of the things done upon them will in most cases make it clear whether the proviso does or does not apply.

Thus under sub-heads (*a*) (*b*) (*c*) and (*d*) such an examination will disclose whether the uses (apart from the element which attracts the statutory definition) to which the premises are appropriated are of such character and extent as to justify describing the premises as mainly either a dwelling-house or a retail shop or a place where a wholesale distributive business is carried on or a place of storage.

Sub-head (*e*) is I think a special case somewhat out of line with the general run of the cases previously mentioned. Under that sub-head it may not be apparent from a mere examination of the premises and of what is done thereon that those who occupy and use them are doing what they do as undertakers of and in connection with a public supply undertaking. Some inquiry outside may be necessary to complete the relevant information. Finally there is sub-head (*f*), which to my mind is only intended to deal with other cases where the main purpose of the occupation and user is not the purpose which has brought the hereditament within the definition of a factory or workshop. This construction renders intelligible the words "purposes . . . . which are not those of a factory or workshop" and relates them to the main use which is made of the premises in cases where there is something in the nature of a mixed user.

Thus the proviso covers what may be called the mixed user cases as distinct from cases where there is on the premises a separation of users which are left to be dealt with by s. 4 of the Act.

The respondents' works are "Letterpress Printing Works" and as such brought expressly within the statutory definition of a non-textile factory contained in the Factory and Workshop Act, 1901.

They are carried on for a trade purpose inasmuch as the products are used in the respondents' tramway business. It is not suggested that there is anything in this user which excludes the works from the statutory definition. Their inclusion in the statutory definition is admitted. The production of printed matter is without doubt a purpose of this statutory factory.

What is there then in the language of the proviso to sub-s. 1 of s. 3 of the Rating Act to make the purpose of the works, while not inconsistent with the statutory definition of a factory, a non-factory purpose within the meaning of the proviso ?

I can find nothing which has this effect. Further I am unable to see why upon the foregoing presentment of the matter either the decision in *Nash* v. *Hollinshead* (1) or the absence of any sale of the products has any relevancy to this case.

I think that the premises in question were properly restored to the Special List and that the appeal fails.

My Lords, in the appeal of the Potteries Electric Traction Company, Ld., the occupiers are the appellants and the Revenue Officer is the respondent. This has come about because the Court of Appeal, while in regard to the proviso to sub-s. 1 of s. 3 of the Rating Act applying the same principles as in the London County Council's case and arriving at a similar conclusion, have held that by reason of sub-s. 2 of s. 3 the premises are not a factory or workshop.

It is admitted by the respondent that so far as the proviso is concerned this case must be governed by the decision of your Lordships in the London County Council's case.

The only question therefore is whether or not having regard to the facts found by the learned Recorder the premises are a " place used by the occupier for the housing or maintenance of his road vehicles or as stables."

Now these words seem to me to refer to what is done on the premises. The manufacture of spare parts for use elsewhere is not in my view within the contemplation of the sub-section.

The findings of fact of the learned Recorder make it plain in my opinion that the premises (other than the paint shop) are not used for maintenance in the sense which I have indicated.

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(1) [1901] 1 K.B. 700.

I do not think therefore that sub-s. 2 of s. 3 applies to the case except so far as the paint shop is concerned.

I agree with the motion proposed.

LORD THANKERTON. My Lords, I concur in the motion proposed. The facts which have given rise to this particular case have been already stated and I need not repeat them or cite again the terms of s. 3 of the Act of 1928.

It is important to observe that s. 3—except in sub-s. 3, with which we are not here concerned—relates to a single hereditament, which forms a separate unit on the Valuation List, and that sub-s. 3 contains the only express authority to have regard to other separately valued units. Sub-s. 4 is merely a definition sub-section, and we have therefore to consider the substantive provisions of sub-ss. 1 and 2, subject to resort to sub-s. 4 for the definition of terms used in these two sub-sections. Further, for present purposes, we may disregard any reference to hereditaments occupied and used as a mine or mineral railway.

Sub-ss. 1 and 2 appear to me to lay down three conditions which must be complied with in order to qualify the hereditament to be entered in the Special List as an "industrial hereditament"—namely :—

(*a*) That the hereditament, or some part of it, is occupied and used as a factory or workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920;

(*b*) if so, that any place used by the occupier for the housing or maintenance of his road vehicles or as stables, which is within the close, curtilage or precincts forming such factory or workshop, is to be deemed not to form part of such factory or workshop for the purposes of s. 3, and

(*c*) if such hereditament is primarily used and occupied for any of the purposes specified under heads (*a*) to (*f*) of the proviso to sub-s. 1, then the hereditament is not an industrial hereditament.

The hereditament here in question admittedly satisfies the first condition and is not affected by the second condition, but the appellant maintains that the hereditament is

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primarily occupied for purposes which are not those of a factory or workshop and falls within head (*f*) of the proviso and therefore is not an industrial hereditament.

The appellant contends that, while it may be true to say that the hereditament is used as a factory for the production of tickets, etc., the sole purpose of that production is for the respondents' tramway undertaking and that the hereditament is therefore primarily used for a purpose which is not that of a factory or workshop. In my opinion that involves too wide a construction of the proviso, and consideration of the purposes detailed in heads (*a*) to (*e*) shows that the inquiry is confined to the actual use and occupation of the particular hereditament. For instance, under head (*a*) the inquiry will be as to whether the particular hereditament is primarily, or mainly, used as a dwelling-house, and would not relate to a case where, for instance, the particular hereditament is used for production of electricity, which provides a private supply for a house or group of houses in the same occupation, but which form separate valuation units. The same reasoning obviously applies to heads (*b*), (*c*) and (*d*). Head (*e*) may not be so clear, owing to the special definition of public supply undertaking, but in that case also it is necessary, in my opinion, to find, by inspection of the particular hereditament, that primarily or mainly it is used for the supply of gas, water, electricity or hydraulic power, although a further inquiry is necessary as to the destination of such supply. These further inquiries are rendered necessary in order to establish that the supply is a public one, but such necessity does not, in my opinion, affect the construction of the proviso.

I have had the opportunity of reading the opinion of my noble and learned friend on the Woolsack and I desire to associate myself with his observations on the series of Scottish decisions which were cited to us.

My Lords, in the case of the Potteries Electric Traction Company, I concur in the opinion of my noble and learned friend on the Woolsack, which I have had the privilege of reading.

MOON v. LONDON COUNTY COUNCIL.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 19, 1930.

Solicitor for the appellant : *Treasury Solicitor.*
Solicitor for the respondents : *S. A. R. Preston-Hillary.*

POTTERIES ELECTRIC TRACTION COMPANY, LD. v. BAILEY.

Order of the Court of Appeal reversed and order of the Court of Quarter Sessions for the borough of Stoke-on-Trent restored with a variation to the effect that the paint shop should not be deemed to be part of the factory within the meaning of s. 3 *of the Rating and Valuation (Apportionment) Act,* 1928. *The respondent to pay the costs in the Courts below and the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.*

Lords' Journals, Dec. 15, 1930.

Solicitors for the appellants : *Sydney Morse & Co.*
Solicitor for the respondents : *Treasury Solicitor.*

[HOUSE OF LORDS.]

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AND

Nov. 28. ATTORNEY GENERAL . . . . . . RESPONDENT.

Civil Service—Superannuation—Rights of Civil Servants under Superannuation Acts—Jurisdiction of Civil Courts—Alleged Contract with Civil Servant based on Treasury Minute—Superannuation Act, 1834 (4 *&* 5 *Will.* 4, *c.* 24), *ss.* 13, 27, 30—*Superannuation Act,* 1859 (22 *Vict. c.* 26), *ss.* 2, 12, 17 —*Superannuation Act,* 1909 (9 *Edw.* 7, *c.* 10), *s.* 1, *sub-s.* 1; *s.* 3, *sub-s.* 1; *s.* 4—*Telephone Transfer Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 26), *s.* 6.

An established civil servant of the Crown has, on the true construction of the Superannuation Acts, 1834 to 1909, no legal right to a superannuation allowance or, when such an allowance has been awarded to him by the Lords Commissioners of the Treasury, to an allowance of an amount fixed by reference to the scale contained in s. 2 of the Superannuation Act, 1859, as amended by s. 1 and s. 3, sub-s. 1, of the Superannuation Act, 1909.

Cooper v. *The Queen* (1880) 14 Ch. D. 311 and *Yorke* v. *The King* [1915] 1 K. B. 852, which were approved by Lord Buckmaster and Lord Loreburn in *Considine* v. *McInerney* [1916] 2 A. C. 162, and by the Privy Council in *Wigg* v. *Attorney-General for Irish Free State* [1927] A. C. 674, 678, and in *In re Transferred Civil Servants (Ireland) Compensation* [1929] A. C. 242, 255 followed.

Dicta of Cozens-Hardy M.R. and Fletcher Moulton L.J. in *In re Lupton* [1912] 1 K. B. 107, 114, 115 not followed.

The appellants, four retired civil servants who had qualified for the award of a superannuation allowance, claimed to be entitled as of right to have superannuation allowances calculated on the full amount of their annual salaries and emoluments, including a bonus granted by the Treasury to civil servants, in accordance with the scale provided by s. 2 of the Superannuation Act, 1859, as amended by s. 1 and s. 3, sub-s. 1, of the Superannuation Act, 1909. Two of the appellants entered the Civil Service on the faith of a statement contained in a Treasury minute of June 14, 1859, to the effect that all persons appointed subsequent to the passing of the Act of 1859 were to be held entitled to the retiring allowances prescribed by the second section of that Act, and they contended that the minute was a continuing offer by the Treasury on behalf of the Crown to such persons that they should receive superannuation allowances on the terms therein contained, and that that offer had been accepted by both appellants. A third appellant entered the service of the National Telephone Company in 1895, and on the

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* *Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, and LORD THANKERTON.

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transfer of the telephones to the Post Office under the Telephone Act, 1911, assigned his share in a contributory pension fund to the Postmaster-General, and was appointed to a pensionable office in the Post Office which qualified him for a superannuation allowance under s. 6 of that Act, which, by s. 10, was to be read as one with the Superannuation Acts, 1834 to 1909. The Lords Commissioners of the Treasury, acting in accordance with a Treasury minute dated March 20, 1922, awarded to each of the appellants a superannuation allowance calculated on a basis differing from and less favourable to him than that provided by s. 2 of the Act of 1859 as amended by s. 1 and s. 3, sub-s. 1, of the Act of 1909, and computed his allowance (1) on his fixed annual salary and emoluments (exclusive of his bonus emoluments) and (2) on a sum less than the full amount of his annual bonus emolument:—

Held, (1.) that the appellants had no legal right enforceable in a Court of law to superannuation allowances calculated according to the scale fixed by s. 2 of the Act of 1859 as amended by s. 1 and s. 3, sub-s. 1, of the Act of 1909; (2.) as to the claim founded on contract, that the only power of the Lords Commissioners of the Treasury was conferred by statute, and that they had no authority to contract themselves out of it; (3.) that the appellant employed in the Post Office received his superannuation allowance on the same footing as the other appellants.

Decision of the Court of Appeal [1930] 1 Ch. 566 affirmed.

Appeal from an order of the Court of Appeal affirming a judgment of Clauson J. (1) at the trial of the action.

The appellants (the plaintiffs in the action) were four retired civil servants of the Crown. The appellant John Nixon, who entered the Home Office in 1877, was transferred in 1883 to the Metropolitan Police Department and retired in 1922. The appellant John Scott entered the service of the National Telephone Company in 1895 and contributed to the pension fund until January 1, 1912, when, under the provisions of the Telephone Transfer Act, 1911, he became a transferred officer, and having assigned his share in the company's pension fund to the Postmaster-General, was appointed to a pensionable office which qualified him for a superannuation allowance under the Superannuation Acts, 1834 to 1909; he retired in 1927. The appellant William Clarke entered the Civil Service in 1882 and retired in 1922. The appellant Benjamin Louis Samuel entered the Civil Service in 1880 and retired in 1925. Each of the appellants, except John Scott, adopted the provisions of the Superannuation Act, 1909, in pursuance of s. 3, sub-s. 1, of that Act; and all four appellants duly complied with all statutory provisions required to enable them respectively to qualify for a superannuation allowance.

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(1) [1930] 1 Ch. 566.

The Lords Commissioners of the Treasury, purporting to act in accordance with the provisions of a Treasury minute dated March 20, 1922, decided that each of the appellants was entitled to superannuation under the aforesaid Acts and awarded to each superannuation allowances, but in calculating the annual allowance or pension to which each was entitled, instead of computing it in the manner prescribed by the provisions of s. 2 of the Superannuation Act, 1859, as amended by s. 1 and s. 3, sub-s. 1, of the Superannuation Act, 1909, as an undivided fixed and invariable sum of one-eightieth of the full aggregate amount of his actual annual salary and emoluments including the full amount of his actual annual "bonus emolument," multiplied by the number of completed years of his pensionable service (not exceeding forty years), awarded to each of them (1.) a fixed annual allowance or pension of one-eightieth of his actual annual basic or substantive salary and emoluments exclusive of his "bonus emolument" multiplied by the appropriate number of his years of pensionable service, and (2.) a further allowance described as an addition or supplement of one-eightieth of a hypothetical sum substituted for his "bonus emolument" which was less than his actual annual "bonus emolument" at the date of his retirement multiplied by the appropriate number of his years of pensionable service; and they directed that the addition or supplement so computed should be varied quarterly by reference to the official average cost of living index figure for the last preceding quarter, with the limitation that the addition or supplement should not exceed an overriding maximum equal to the amount which would have been arrived at if the addition or supplement had been calculated upon his full actual annual "bonus emolument." Further, in calculating the additional lump sum superannuation allowance to which each appellant was entitled, instead of calculating it as a single sum upon the full aggregate amount of his actual annual salary and emoluments including his

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actual annual "bonus emolument" at the date of his retirement, they calculated it as (1.) a substantive allowance computed upon his actual annual basic or substantive salary and emoluments exclusive of his "bonus emolument," and (2.) an addition or supplement calculated upon three-quarters only of the aforesaid hypothetical sum substituted for and being less than his actual annual "bonus emolument" at the date of his retirement.

The appellants Nixon and Clarke alleged and proved that they entered the Civil Service on the faith of a Treasury minute, dated June 14, 1859, which was published in the Civil Service Year Book and there seen by them. That minute was as follows: "With regard to persons appointed or to be appointed subsequent to the passing of the Superannuation Act 1859 My Lords observe that the language of the Act is precise, and that such persons are to be held entitled to the retiring allowances prescribed by the 2nd Section of the Act provided they fulfil the conditions of the 17th Section and provided My Lords do not find it necessary to exercise the power conferred on them by the 9th Section of reducing the allowance on account of the demerits of the person claiming it." They claimed that this minute was issued to the public by the Lords Commissioners of the Treasury on behalf of the Crown and constituted an offer of service under the Crown upon the terms therein contained, and that they had both accepted that offer.

In this action against the Attorney-General the appellants claimed (1.) a declaration that each was entitled as of right to have the amount of his superannuation allowances calculated in the manner prescribed by S. 2 of the Superannuation Act, 1859, as amended by s. 1 and s. 3, sub-s. 1, of the Superannuation Act, 1909; and (2.) a declaration that the Treasury minute of March 20, 1922, in so far as it purported to put any limitation on the right of each of the appellants to have the amount of his annual superannuation allowance or pension and/or the amount of his additional lump sum superannuation allowance calculated on the full amount of his actual annual salary and emoluments, including the full amount of the actual annual "bonus" emolument payable at the date of his retirement, and in so far as it purported to make the said annual allowance or pension vary from time to time, was contrary to the provisions of the Superannuation Acts and was null and void, and that the application of such minute in the awarding and computing of the superannuation allowances of each of the appellants was ultra vires.

Clauson J. held (1.), upon the construction of the Superannuation Acts, 1834–1909, that the Courts of law had no jurisdiction to deal with the matter in dispute, which was one to be decided by the Treasury, and that the so-called right of a civil servant to a pension was not a legal right, and could not be enforced by any legal proceedings; (2.) that Scott's position did not differ from that of the other appellants; and (3.) that the Treasury minute of June 14, 1859, did not constitute the basis of a contract.

The Court of Appeal (Lord Hanworth M.R., Lawrence and Romer L.JJ.) affirmed his decision on the same grounds.

1930. Nov. 27, 28. *Schiller K.C.* and *J. V. Nesbitt* for the appellants. Before 1810 the superannuation of the civil servants of the Crown was a prerogative matter and the Sovereign had a complete and unfettered power to grant pensions to civil servants to any amount; but in that year Parliament intervened and an Act (50 Geo. 3, c. 117) was passed transferring from the Sovereign to the Lords Commissioners of the Treasury the control and payment of pensions to civil servants. This Act was succeeded by others, but in 1834 the Superannuation Act, 1834, was passed to amend and consolidate the laws for regulating these pensions and all the previous Acts were repealed. That Act fixed the amounts which pensions were not to exceed. Sect. 30, which is still in force, provided that nothing in that Act should extend to give any person "an absolute right" to a superannuation allowance. That does not mean that the Act confers absolutely no right, but means that it confers no unconditional right, and it is consistent with a civil servant having a legal right to an allowance provided he fulfils the conditions

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requisite to qualify him therefor, though the amount is left to the Lords Commissioners of the Treasury. Then came the Superannuation Act, 1859. In that Act the language changes and the pensions are standardized. Sect. 2 provides that the allowances are to be according to a prescribed scale which is there set out. That section contains a proviso that if any question should arise in any department of the Civil Service as to the claim of any person or class of persons for superannuation under that clause it should be referred to the Commissioners of the Treasury, whose decision should be final. In the appellants' submission that proviso relates only to the question whether the civil servant is entitled to a pension at all, but when once that claim has been decided the Commissioners are bound by the scale laid down by the statute as to the amount. This view is confirmed by the later sections. The Act speaks of persons "entitled" to pensions and other persons who are not qualified by service under the Act, and gives a special power to the Commissioners to grant a pension in the latter case; it also gives power to the Commissioners to grant a pension of a reduced amount where the defaults or demerit of the civil servant appear to them to justify that diminution. Those provisions are inconsistent with the respondent's contention that the amount of superannuation allowance is entirely at the discretion of the Treasury. Lastly came the Superannuation Act, 1909, which altered the scale fixed by s. 2 of the Act of 1859. The effect of the Acts, taken as a whole, is that a person awarded a superannuation allowance has a right to a pension of a fixed amount to be determined by s. 2 of the Act of 1859 as amended by s. 1 of the Act of 1909. The bonus granted to the civil servants has been treated as a pensionable emolument, and the whole bonus ought to be included in the computation in accordance with those provisions. As to the authorities, this question was decided against the appellants in *Cooper* v. *The Queen* (1) and *Yorke* v. *The King* (2), but those were decisions of Courts of first instance. In *In re Lupton* (3)

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(1) 14 Ch. D. 311.
(2) [1915] 1 K. B. 852.
(3) [1912] 1 K. B. 107, 114, 115.

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Cozens-Hardy M.R. and Fletcher Moulton L.J. regarded the Act of 1909 as conferring on civil servants a right to allowances of a fixed amount. In *Considine* v. *McInerney* (1) Lord Buckmaster expressed an opinion adverse to this right, but it was not necessary to the decision of that case. *Cooper* v. *The Queen* (2) and *Yorke* v. *The King* (3) were also recognized, but distinguished by the Privy Council in *Wigg* v. *Attorney-General for the Irish Free State* (4) and *In re Transferred Civil Servants (Ireland) Compensation* (5), but in each of those cases the Board was dealing with an entirely different question.

Sir William Jowitt A.-G., *Sir Stafford Cripps S.-G.*, *Stafford Crossman* and *Wilfrid Lewis* for the respondent were not called upon.

Viscount Dunedin. My Lords, it is the right of every litigant who has lost his case before the Court of Appeal to bring an appeal to this House unless there is some statutory reason against it, and one cannot wonder that the gentlemen who have brought this appeal feel strongly upon the matter in which they think that they have been unjustly dealt with in regard to a pension. But although I say that, that does not make any difference as to the quality of the appeal when brought. I confess that I have listened for some hours without discovering that even the ingenuity of counsel could bring forward any argument that was much worth consideration, and I think they were driven, as they were in duty bound driven, to the ultimate virtue of persistency.

My Lords, I think your Lordships will best show what you think of the merits of the case by deciding the case at once, and indeed, if you did not do so, I think you would be forcing yourselves to indulge in a process of tautology, because it is quite impossible to say anything more than has been already said in the very long and very careful judgments of the learned judges of the Court of Appeal in this case. For myself, I think that the matters mooted can be disposed of in a very few sentences, and I propose to do so.

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(1) [1916] 2 A. C. 162.

(2) 14 Ch. D. 311.

(3) [1915] 1 K. B. 852.

(4) [1927] A. C. 674, 678.

(5) [1929] A. C. 242, 255.

My Lords, there is, first, the question of how the matter stands upon the statutes. The learned counsel had to admit that in quite the early days there obviously was no actual right in a servant of the King to have a pension, and he really pinned his faith to the Act of 1859 and the second section of it. It is impossible, of course, in that section to find positive words which direct that a pension must be granted; the phrase is: "Subject to the exceptions, the Superannuation Allowance to be granted after the commencement of this Act to persons who shall have served shall be," so-and-so. All through the Acts that follow there is a frequent use of the word "entitled," but "entitled," I take it, shows no more than entitled to such as the Acts give him. I cannot do better there than quote the phrase which Lord Buckmaster used in *Considine* v. *McInerney* (1), where, summing up the position, he says: "He was entitled to expect an annual allowance," and then he goes on, in the well known words that have been so often quoted, to say: "This expectation, though it might be relied on with full certainty, was none the less not a legal right, and no claim for it could be enforced by any legal proceedings." But the difficulty under that Act and the following Acts does not end there, because, in the first place, there is s. 30 of the Act of 1834, which was specially exempted from the repeal which was made of all other sections, and has to be read with all the Acts up to the present date. The only argument that was presented upon that was that s. 30 of the Act of 1934 says there is to be no absolute right. My Lords, to get out of a provision that you are not to have an absolute right a positive provision that you are to have a right, is an argument which has only to be stated to be rejected. And even that is not the end of it, because there is a proviso to this very s. 2, which is in the forefront of the case, which provides that if any question should arise in any Department—that is to say, in any of the

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(1) [1916] 2 A. C. 162, 170.

Departments who engage civil servants—of the Public Service as to the claim of any person to superannuation, it shall be referred to the Commissioners of the Treasury, whose decision shall be final. Therefore, that obviously excludes the Courts of law, because it makes the decision of the Commissioners of the Treasury final. So far upon the Acts.

When we come to authority, it seems to me that this case is most amply covered by authority. I agree that it is not covered by authority in this sense, that there is no actual judgment which binds this House, in which the precise point was the necessary and only point in the case. But the amount of learned opinion is quite overwhelming. In the first place, I do not think one must altogether forget the two old cases where the question was actually raised in absolute terms. No doubt they are not binding on this House, because they were decisions only of judges of first instance, but they were very learned judges, and their judgments have stood for many years without there being a single note of question against them in any case. Then, when one comes to more modern times, and to pronouncements in this House, there is the considered judgment of Lord Buckmaster, where, although the question may be said to be obiter to the case, it certainly was not obiter to the view that Lord Buckmaster took of the case, and accordingly he considered very carefully the series of statutes, and made that pronouncement which I have already quoted. Lord Loreburn gave an opinion to the same effect, although it was not so necessary in his view to consider that matter, but he went out of his way to say so. We have also the opinion of Lord Cave in the Privy Council and of Lord Reading in the Privy Council. That is really a very great array of authority, against which it would not be easy to go, unless there was some cogent reason for thinking that all those learned persons were wrong, and all that can be put against it is a casual expression, or, rather, I think, an incautious expression, made by the Master of the Rolls and Fletcher Moulton L.J. in *Lupton's* case (1), where it was not necessary for them to consider the matter, and the matter was not argued, and I am afraid they slipped into that expression without exactly knowing what the result of it would be. Now that ends the main point on the general question.

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(1) [1912] 1 K. B. 107.

My Lords, as to a special position being held by these gentlemen on contract, the answer to that, I think, is absolutely conclusive. If you find that the statutes give the Lords of the Treasury a discretion, that is their power, and their only power, and they cannot possibly by contract take themselves out of it. They might by contract possibly involve themselves in personal liability, but they never could involve the Crown, because they are not authorized to make any such contract.

My Lords, that ends the matter, except for what is called the second question, namely, whether, even if there is not any right to a pension, nevertheless, if the pension is granted, it must be granted according to certain scales laid down in the Acts. My opinion upon that is that there is no second question; it is only the first question put in another way, because, if you have not a right to sue at all to say that you are to recover your pension as such, it does seem to me perfectly impossible to say that you have a right to a declaration that your pension must be so-and-so. Therefore the second question, I think, practically has only to be stated to show that it does not exist.

My Lords, for these very short reasons I move your Lordships that this appeal should be dismissed.

LORD WARRINGTON OF CLYFFE. My Lords, I concur, and I have nothing to add, except, perhaps, I ought just to mention the point with regard to the man who was in the service of the telephone company. Really there is no separate point in regard to him, because the Act under which he receives his superannuation allowance is to be read with the other Superannuation Acts.

LORD TOMLIN. My Lords, I concur.

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LORD THANKERTON. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, Nov. 28, 1930.

Solicitors for the appellants: *Percy Robinson & Co.*
Solicitor for the respondent: *Treasury Solicitor.*

Referred to. OIVIND LORENTZEN'S CASE. [1949] A. C. 236

[HOUSE OF LORDS.]

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Dec. 9.

OWNERS OF STEAMSHIP KITANO MARU . . . . APPELLANTS;

AND

OWNERS OF STEAMSHIP OTRANTO . RESPONDENTS.

[THE OTRANTO.]

Shipping—Collision—Vessels on crossing Courses—Duty of "stand on" Vessel—Regulations for Preventing Collisions at Sea, 1910, *arts.* 19, 21 *and note thereto,* 27.

By art. 19 of the Collision Regulations: "where two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other," which (under art. 21) "shall keep her course and speed"; but by the note to art. 21, "when, in consequence of thick weather or other causes such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she [the stand-on vessel] also shall take such action as will best aid to avert collision."

By art. 27, "in obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Two steam vessels, the *K. M.* and the *O.*, were approaching each other on crossing courses of nearly a right angle at a joint speed of nearly 30 knots. The *O.*, the stand-on vessel, had the *K. M.* broad on the port bow at a distance of several miles. As the bearing of the

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, and LORD THANKERTON.

K. M. did not alter, the *O.*, when the vessels were under three-quarters of a mile apart, hard-a-starboarded to pass under the stern of the *K. M.* and sounded two short blasts. Twenty or thirty seconds afterwards the *K. M.* hard-a-ported and sounded one short blast, and the two vessels came into collision less than three minutes after the alteration of course by the *O.*

It being admitted that the *K. M.* was partly to blame for the collision the question was whether the *O.* was also to blame:—

Held, that the master of the *O.* was justified in acting when he did, but not in starboarding and maintaining his speed. He ought, first of all, to have stopped and reversed his engines and, in addition, whatever action he took should have been under a port helm.

Held, therefore, that both vessels were to blame.

Observations by Lord Buckmaster as to the meaning and effect of art. 21 with the note thereto, and art. 27 of the Collision Regulations.

Dicta of Lord Herschell in *The Tasmania* (1890) 15 App. Cas. 223, 226; of Vaughan Williams L.J. in *The Hawke* [1913] P. 214, 245; and of Sir Gorell Barnes in *The Albano* [1907] A. C. 193, 207 followed.

The Orduna [1919] P. 381 and [1921] 1 A. C. 250 distinguished.

Decision of the Court of Appeal [1930] P. 110 reversed.

Appeal from an order of the Court of Appeal (1) varying a judgment of Hill J. in an action arising out of a collision between the *Kitano Maru* and the *Otranto*.

The facts are fully stated in the opinion of Lord Buckmaster and are summarized in the headnote.

Hill J. held that the *Kitano Maru* was to blame for giving way too late, for hard-a-porting, and for not going astern as the *Otranto* sounded two short blasts and was seen to be swinging to port. He also held that the time had come when, as a matter of seamanship, the master of the *Otranto* was entitled to act under the note to art. 21 of the Collision Regulations, but that he was to blame for starboarding and for failing to take off way. In the result he held both vessels to blame in equal degrees.

The owners of the *Otranto* appealed. The Court of Appeal by a majority (Lawrence and Greer L.JJ.; Scrutton L.J. dissenting) allowed the appeal. In the opinion of the majority the *Otranto* was justified in acting when she did and was not to blame for starboarding and keeping her speed. The proximate cause of the collision was the porting of the *Kitano*

(1) [1930] P. 110.

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Maru after the *Otranto* had signalled that she was starboarding, and the *Kitano Maru* was alone to blame.

The owners of the *Kitano Maru* appealed, and asked that the judgment of Hill J. should be restored.

1930. Nov. 11, 13, 14. *Dunlop K.C.* and *R. F. Hayward* for the appellants. Scrutton L.J., differing on this point from Hill J., was right in doubting whether the time for the master of the *Otranto* to take action under the note to art. 21 had arrived, as in the circumstances then existing it was established that the *Kitano Maru* could by her own action have avoided the collision. It is of the highest importance that arts. 19 and 21 should be strictly enforced. If the "stand-on" ship acts too soon she may put the give-way ship in a position of great difficulty, and she ought to keep her course and speed until the last possible moment. The margin allowed to the master of the "stand-on" ship in the stress of collision is a very narrow one, and it has been exceeded in the present case. The master is not entitled to speculate on what the give-way ship will do, as that would be to substitute his discretion for the rule. The authorities on this point are reviewed in the judgments of the Court of Appeal. [They referred to *The Orduna* (1); *The Ulrikka* (2); *The Khedive* (3); *The Pamelia* v. *The Western Star* (4); *The Huntsman* (5); *The Albano* (6); *The Hawke* (7); *The Tryst* (8); and Marsden on Collisions, 8th ed., p. 434.] Assuming that the master was justified in acting when he did he was wrong in not taking off speed and in starboarding. His only proper course was to stop and reverse: *The Beryl*. (9)

A. T. Miller K.C. and *Hugh Dumas* for the respondents. The *Otranto* was put into a position of such danger owing to the negligent navigation of the *Kitano Maru* that he was bound to use his judgment having regard to the facts. In starboarding and maintaining his speed he must have avoided

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(1) [1919] P. 381; [1921] 1 A. C. 250.

(2) (1922) 13 Ll. L. R. 367.

(3) (1880) 5 App. Cas. 876.

(4) (1920) 5 Ll. L. R. 316.

(5) (1911) 11 Asp. M. L. C. 606.

(6) [1907] A. C. 193.

(7) [1913] P. 214.

(8) (1909) 79 L. J. (P.) 17.

(9) (1883) 9 P. D. 4.

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the collision but for the insane action of the other vessel in porting. The master's action must be judged according to the facts existing at the time and not by what happened afterwards. He cannot be held to be wrong by reason of the subsequent misconduct of the other ship: *The Bywell Castle.* (1) In any event the *Kitano Maru* was mainly to blame, and the trial judge should have apportioned the blame on that footing.

[They also referred to *The Volute.* (2)]

Dunlop K.C. in reply. As to the apportionment of the blame there is nothing to justify any departure from the ordinary rule. The discretion of the trial judge on a matter of this kind will not be readily interfered with.

The House took time for consideration.

1930. Dec. 9. LORD BUCKMASTER. My Lords, on August 11, 1928, in the North Sea, off the mouth of the Humber, the *Otranto*, a twin screw steamship of 20,032 tons gross register and 658 feet in length, bound from Immingham in the Humber to Copenhagen on a cruise to Norway with 565 passengers, was proceeding at a speed of about 16 knots on a course of N. 59° E. true. The *Kitano Maru*, a twin screw steamship of 7952 tons gross register and 424 feet in length, was bound from Middlesbrough to Antwerp partly laden with cargo. She was proceeding at a speed of about 13 knots on a course of S. 38° E. true. The wind was light, the sea smooth and the tides were slack.

The courses of the vessels were crossing at about a right-angle, the *Kitano Maru* bearing about 3½ points on the port bow of the *Otranto* and the *Otranto* bearing about 4½ points on the starboard bow of the *Kitano Maru*. It was the duty of the *Kitano Maru*, being the vessel which had the other on her starboard side, to keep out of the way of the *Otranto* and avoid crossing ahead of her. The time of day was just after 8 P.M. The light was good, permitting of seeing approaching vessels without difficulty but making the

(1) (1879) 4 P. D. 219. (2) [1922] 1 A. C. 129, 144.

estimate of distance a little uncertain. There resulted a collision between the two vessels in which both vessels were injured. Litigation was initiated at the instance of the owners of the *Kitano Maru* against the owners of the *Otranto*, in which litigation the claim was met by a counterclaim. The case was heard before Hill J. with the assistance of Trinity Masters, who found both vessels to blame and made no apportionment of damage. Appeal was taken to the Court of Appeal who, sitting with assessors, by a majority, Scrutton L.J. dissenting, found the *Kitano Maru* alone to blame. Appeal has now been taken to your Lordships' House and what is asked is to restore the judgment of Hill J.

It has not been contended that the *Kitano Maru* was not to blame. Hill J., before whom the case depended, found that the crew on board the *Kitano Maru* put forward an absolutely false account of the events prior to the collision. He said in plain words that the witnesses were liars. On the other hand, he believed the story given by the officers on board the *Otranto*. That estimate was agreed to by all the learned judges of the Court of Appeal. The facts of the case may, therefore, be taken according to the testimony on board the *Otranto*. The *Kitano Maru* was first observed from the deck of the *Otranto* a little before 8.30, at which time she was about six to seven miles distant, by Shurrock, the supernumerary second officer, who had come on duty at 8 P.M. At 8.29 he took a bearing of the *Kitano Maru*. This he took from the standard compass. He then returned to the bridge but went up again at 8.35 P.M. and took another bearing, and found it was the same as before. The *Kitano Maru* was still a good way off. He continued to watch her and finding that she was not altering her bearing he sent for the captain, who came at once at 8.40 P.M. At that time he estimated the distance between the two ships at about 2½ miles. He went and took another bearing and found it practically the same. The story may now be taken up according to the testimony of the captain. On arriving on the bridge he was told by the second officer of what he had observed as to the bearing. He estimated the vessel at this time at about 2½ miles off. He watched her closely and could see her quite well, but she held on her course without altering either course or speed. That continued five minutes, another report as to the bearing being unaltered was given by the second officer from the compass. By this time she was apparently up to a quarter to half a mile distant. Then, to give the captain's own words: "I considered that I was in a very dangerous position. She had shown no sign of altering her course or speed and I assumed that she was trying to cross my bow and I thought it was time for me to take immediate action." Accordingly, at 8.45 P.M. he ordered the helm hard-a-starboard and sounded two short blasts. Up to this time there had been no alteration on the part of the *Kitano Maru* of either course or speed. Half a minute after the helm of the *Otranto* had been put hard to starboard and when the vessel had begun to pay off, the second officer suddenly shouted: "She is altering her course to starboard. She is porting," and then, again using the words of the captain, "I immediately gave an order 'hard-a-port', but the ships were so close together then that I could see that a collision was inevitable, but, I think, before the helm was even amidships I put her helm back to hard starboard and from the time I starboarded my ship was swinging hard to port under a starboard helm. At 8.48 P.M. the collision occurred. One minute before the collision the engines of the *Otranto* were put hard astern."

The regulations applicable to this set of circumstances are these :—

"19. Where two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

21. Where by any of these Rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See Articles 27 and 29.)

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27. In obeying and construing these Rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above Rules necessary in order to avoid immediate danger."

I agree with Greer L.J. that these rules must aid each other and that the note to r. 21, which relates to special conditions, does not destroy the effect of r. 27, which is of general application.

In obedience to r. 21, therefore, the *Kitano Maru* was the ship bound to give way, and the *Otranto* to keep her course and speed. The negligence of the *Kitano Maru* was gross and palpable. She made no attempt whatever to give way until within two minutes of the spot where disaster was inevitable. She did not, in fact, stir from her course until thirty seconds after the *Otranto* had begun to swing to port, and she then turned to starboard under a port helm. It was impossible to excuse such manœuvres, and, apparently recognizing this fact, the story told on behalf of her owners was found to be a mass of deliberate and concocted lies.

With this comment she can pass from consideration, for the real issue in this case, on which there has been great divergence of judicial and nautical opinion, is whether the *Otranto* was negligent in what she did ?

The negligence alleged against her can be summed up under four heads :—

(1.) That she had no right to alter her course or her speed at the moment she did.

(2.) That if any step taken by her could be justified, it would have been that of reversing her engines.

(3.) That if she altered her helm, she should have altered it to port and steered her course to starboard.

(4.) That even if the engines had not been stopped before, they should have been stopped at once when she realized that the *Kitano Maru* was moving to starboard.

The only one of these points that is of general application is that relating to the moment when the *Otranto* altered her course, and upon this Hill J. and Scrutton L.J. are at variance. Much has been said about this rule in many cases.

It is beyond all doubt of the utmost consequence that it should be obeyed. The ship that is bound to keep her course is not entitled to alter it at a moment when there is ample time for the ship that is bound to give way to discharge her duty, for that ship is entitled to rely upon obedience to the rule by the ship that has to keep her course. But, acknowledging to the full the vital consequence of strict obedience, there still remains the fact that these rules were made for the guidance of mariners and not of mathematicians, and that it is not right, by an elaborate process of calculation after the event, to decide that the ship that was bound to keep her course acted a little before the moment that in fact she need have done. When two ships are travelling at 16 and 13 knots an hour, the moment when safety has passed and peril has arrived cannot be determined to a hair's breadth. The rule was designed to secure that the stand-on vessel shall maintain her course until the last safe moment. What that safe moment is must depend primarily upon the judgment of a competent sailor, forming his opinion with knowledge of the necessity of obedience to the rule and in face of all the existing facts. Subsequent examination may show that his judgment could not properly have been formed, in which case the rule has been broken without excuse, but the ultimate decision is not to be settled merely by exact calculations made after the event, but by considering these facts as they presented themselves to a skilled man at the time. This is in close accordance with the view expressed by Lord Herschell in *The Tasmania* (1), where he says: "as soon then as it was, or ought to a master of reasonable skill and prudence to have been, obvious that to keep his course would involve immediate danger, it was no longer the duty of the master of the *Tasmania* to adhere to the 22nd [now the 21st] Rule. He was not only justified in departing from it, but bound to do so, and to exercise his best judgment to avoid the danger which threatened," and again with Vaughan Williams L.J. in *The Hawke* (2), where he says: "I am inclined to think

(1) 15 App. Cas. 223, 226.
(2) [1913] P. 214, 245.

that in a case where good seamanship would assume that collision cannot be avoided by the action of the giving-way vessel alone, the case falls within the exception"—namely, the exception to the rule to keep course and speed—"even though in fact the giving-way vessel could by her own action have averted collision." This is confirmed in other words by Lord Parker in the same case. In *The Orduna* (1) Bankes L.J. comments on this but does not express disagreement, nor can I find there was any disapproval in the judgment of this House in *The Orduna.* (1) A sentence from the opinion of Lord Sumner shows at once how that case differs from the present: he says: "The evidence of the officer of the watch, that at the moment when he took helm action he judged the position to be a safe one, leaves him without excuse." Here I have already referred to the evidence of the captain upon the point in chief and to it may be added his answers.

In cross-examination, he is there asked:

Q. "Was it then (i.e. at 8.44) that you gave the order to starboard?"

A. "Just after that."

Q. "At that time do you say that it was a very dangerous position?"

A. "Yes."

And there is no evidence nor, in my opinion, any calculation that would justify us in saying he was wrong. In *The Albano* (2) Sir Gorell Barnes in giving the judgment of the Privy Council says this: "It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point, but the precise point must necessarily be difficult to determine, and some little latitude has to be allowed to the master in determining this."

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(1) [1919] P. 381, 389; [1921] 1 A. C. 250, 260.

(2) [1907] A. C. 193, 207.

In these circumstances, I am not prepared to hold that the captain of the *Otranto* broke any rule when he decided to act. The lives of 560 passengers were in his care, and with such responsibility calculations cannot be expected to be as minute and accurate as when distances, speed, and times are afterwards plotted out in a Law Court on a sheet of paper. All the six experienced men who have advised the Courts on this point are in agreement with this conclusion.

But although the captain was entitled to act, I am unable to find that his action was in accordance with the requirements of good seamanship. First, and before all things, he ought to have stopped and reversed his engines. Upon this point the nautical assessors by whom we have been advised are in agreement. This, by itself, might have saved an accident. But, in addition to this, whatever action he took ought to have been under a port helm, which would have tended to draw his vessel into line with the *Kitano Maru* and not opposed to it. I realize that his feeling was not to expose his unprotected flank to the beak of the Japanese ship, but in doing what he did he courted disaster, while the other manœuvre would have taken him into safety. I think, too, that, 30 seconds after he began to move, even if his engines had not been reversed before, they should have been reversed even then, though I doubt if, when once the initial mistake had been committed and the boat was swinging under a starboard helm, the collision could have been avoided, and had he changed to port helm, which he momentarily tried to do he might have received the blow amidships.

I have examined, but I have not been able to find much assistance from, the authorities. It seems to me impossible to lay down a general rule that in all cases of crossing ships a starboard helm for the stand-on ship must necessarily be a negligent act. It probably often is so, and it is remarkable that in no case quoted has a port helm been held negligent in similar circumstances, and in only one case, *The*

Rayford (1), has starboarding been excused. Scrutton L.J., who was one of the members of the Court of Appeal, says that in that case the view taken was that the starboarding was so slight as not to affect the collision. In the present case, coupled with maintaining speed, it was, as our assessors advise, a negligent manœuvre for which the *Otranto* must suffer the consequences, and from these consequences I cannot hold her absolved by the subsequent action of the *Kitano Maru*. Upon the question of altering the share of responsibility each has to take, this is primarily a matter for the judge at the trial, and unless there is some error in law or fact in his judgment it ought not to be disturbed.

I am therefore of opinion that the judgment of Hill J. was right in all respects and should be restored.

Viscount Dunedin. My Lords, I concur. I confess I do so with the greatest regret, because I think the captain of the *Otranto* was put in a terribly difficult position by the utterly unjustifiable conduct of the *Kitano Maru*, but, in view of the advice that we got from our assessors and also the views expressed already by my noble friend on the Woolsack, I am unable to resist the conclusion that the captain of the *Otranto* was wrong in keeping full speed.

Lord Blanesburgh. My Lords, I also concur.

Lord Thankerton. My Lords, I concur.

Lord Buckmaster. My Lords, my noble and learned friend Lord Warrington desires me to say that he concurs.

Order of the Court of Appeal reversed and judgment of Hill J. restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House. Cause remitted back to the Admiralty Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Dec. 9, 1930.

Solicitors for the appellants: *Waltons & Co.*

Solicitors for the respondents: *Parker, Garrett & Co.*

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(1) (1922) 10 Ll. L. R. 743.

[HOUSE OF LORDS.]

LEONARD . . . . APPELLANT ;

AND

REDBROOK TINPLATE COMPANY, LIMITED . . . . RESPONDENTS.

H. L. (E.)*
1930
Dec. 9.

Workmen's Compensation—Industrial Disease—Cataract—Inclusion by Order of Secretary of State—Order limiting Period of Compensation—Ultra vires—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-s.* 3—*Workmen's Compensation* (*Industrial Diseases*) *Consolidation Order*, 1929, *paras.* 1 *and* 3.

Sub-s. 3 of s. 43 of the Workmen's Compensation Act, 1925 (the industria diseases section), gives the Secretary of State power to " make Orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the Order not being injuries by accident, either without modification or subject to such modifications as may be contained in the Order."

The Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929, para. 1, extends the provisions of s. 43 of the Act, " subject to the modifications hereinafter specified," to (inter alia) cataract caused by exposure to rays from molten or red-hot metal. Para. 3 provides that " a person suffering from cataract shall not be entitled to compensation under the provisions of the said section on account of that disease for more than six months in all," subject to a power of extension at the discretion of the arbitrator acting on the advice of the Medical Referee :—

Held, that para. 3 was a " modification " within the meaning of s. 43, sub-s. 3, of the Act, and was therefore not ultra vires.

Decision of the Court of Appeal [1930] 1 K. B. 643 affirmed.

APPEAL from an order of the Court of Appeal (Lord Hanworth M.R., Slesser and Romer L.JJ.) (1) affirming an award made by the deputy judge of the county court of Monmouthshire.

The following statement is taken from the opinion of Viscount Dunedin :—

" The appellant in this case worked as a furnace man in the tinplate works of the respondents at wages at an average of 4*l.* 4*s.* 3*d.* a week. On December 7, 1927, the certifying surgeon appointed under the Factory and Workshop Act certified (1) that he was suffering from cataract caused by exposure to rays from molten metal. From the said date up to October 8, 1928, he was paid by the respondents 30*s.* a week compensation. In January and May, 1928, he underwent two successive operations for cataract. In October, 1928, he returned to light work away from the glare of the furnace, and his weekly wage was 1*l.* 19*s.* 1*d.* In November, 1928, he tried to return to his original work but the attempt was not successful. On May 25, 1929, he filed a request for arbitration, claiming compensation at the rate of 1*l.* 2*s.* 7*d.*, that sum being half the difference between his old wages and the wages obtainable by light work, such compensation to run from October 8, 1928, the last date on which compensation had actually been paid.

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* *Present :* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, and LORD TOMLIN.

(1) [1930] 1 K. B. 643.

The respondents refused to pay. The present Workmen's Compensation Act is the Act of 1925. It is familiar ground, and the sections need not be quoted at length. The scheme of the Act qua industrial diseases is to put injuries arising from the industrial diseases scheduled to the Act in the same position, with certain modifications, as an injury arising from an ordinary accident arising in the course of and out of the employment.

Sub-s. 3 of s. 43, the section dealing with industrial diseases, is as follows: '(3.) The Secretary of State may make orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the order not being injuries by accident, either without modification or subject to such modifications as may be contained in the order.'

In accordance with these powers, the Home Secretary, on January 1, 1929, issued a Consolidating Order as to industrial diseases. The material parts of that Order are as follows: '(1.) Subject to the modifications hereinafter specified the provisions of section 43 of the Workmen's

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(1) Under the Workmen's Compensation (Iron Workers Cataract) Order, 1925.

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Compensation Act, 1925, shall extend and apply to the diseases, injuries, and processes, specified in the first and second columns of the Schedule annexed to this Order, as if the said diseases and injuries were included in the first column of the Third Schedule to the Act, and (where processes are specified in the second column of the annexed Schedule) as if the said processes were set opposite in the second column of the Schedule to the Act to the diseases or injuries to which they are set opposite in the second column of the Schedule annexed hereto.'

'(3.) A person suffering from cataract shall not be entitled to compensation under the provisions of the said section on account of that disease for more than six months in all, or for more than four months unless he has undergone an operation for cataract.

'Provided that where the judge, committee or arbitrator is satisfied on the advice of the medical referee that an operation could not for medical reasons be performed within four months from the date of disablement, or that having undergone an operation, the worker is still disabled by the cataract after the expiration of six months from such date, compensation may be continued for such further period and subject to such conditions as the judge, committee or arbitrator may direct, without prejudice, however, to the right of review conferred by section 11 of the Act.'

'SCHEDULE.

'18. Cataract caused by exposure to rays from molten or red-hot metal.

'Any process in the manufacture of iron or steel normally involving exposure to rays from molten or red-hot metal.'

The county court judge, sitting as arbitrator, referred to the medical referee the following questions :—

'1. Has the workman, as and from October 8, 1928, been disabled from earning full wages at his old work of furnace man?

'2. Has the industrial disease for which he was certified on December 7, 1927, caused or contributed (*a*) wholly or (*b*) in part (stating which) to such disablement, if any?'

To which he received the following answers :—

'1. Yes.

'2. In part, as the right eye is not a perfect eye but has an error of hyperopia and astigmatism which causes a strain for this eye to see sharply without a glass, and this strain is more pronounced now he has only one eye to use instead of two. The irritability of the left eye to heat also affects the right eye.'

He then pronounced the following judgment :—

'There are certain features in this case which justify the matter being dealt with on the footing that an extension of the period of six months allowed by the Order would be warranted in view of the report of the medical referee. Having regard to the fact that already the applicant has been paid compensation by respondents beyond a period of six months, that is to say from December 7, 1927, to October 8, 1928, and to the fact that the applicant's present disability from earning full wages at his old work is due only in part to such industrial disease as explained in detail by the medical referee, to whom the matter was referred, I fix the further period for which he is entitled to compensation at the amount agreed upon 1*l.* 2*s.* 7*d.* at 10 weeks from October 8, 1928.'

The appellant appealed to the Court of Appeal, who dismissed the appeal and confirmed the order of the county court judge as arbitrator. The appellant now appeals to this House."

1930. Nov. 6. *Edward Cave K.C.* and *James MacMillan* for the appellant. 1. The Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929, in so far as it restricts the rights of the workman in respect of the amount and duration of his compensation is ultra vires. The modifications which the Secretary of State is authorized to make by sub-s. 3 of s. 43 have reference to that section and do not extend to the whole Act. It was not intended by that subsection to give the Secretary of State power to modify the sections of the Act prescribing the amount and duration of compensation payable to workmen who have suffered personal injury by accident arising out of and in the course of their employment or to their dependants in case of the death of such workmen. When once a workman is brought within the purview of the Act he is entitled to compensation in the terms of the Act. Sect. 43 contains no provisions affecting the amount and duration of compensation to be awarded to workmen entitled thereunder to compensation, but is confined to machinery. Para. 3 of the Order is therefore not a modification of the provisions of the section. [They referred to ss. 36, 37 and 47 of the Act.] The Order is severable so as to be ultra vires as to one portion and intra vires as to another.

2. There has been no proper exercise of discretion by the county court judge.

A. T. James K.C. and *Godfrey Parsons* for the respondents were not called on.

The House took time for consideration.

1930. Dec. 9. LORD BUCKMASTER. My Lords, in this case I have had the opportunity of reading the opinion written by my noble and learned friend Lord Dunedin; with it I agree and to it I have nothing to add.

VISCOUNT DUNEDIN (after a narrative of the facts). My Lords, the contentions of the appellant were the same in both Courts below, and are the same before your Lordships. His points are two. First, he says that the provision of the Consolidating Order which limits the compensation payable for the particular form of injury to six months at most, subject to a power of extension at the discretion of the arbitrator, was ultra vires, and that the result is that there is a finding of partial incapacity, so that judgment should be given for a weekly payment of 1*l.* 2*s.* 7*d.* (there being no dispute as to the figure), to continue like any other payment for partial incapacity until the respondents can obtain, on application to the arbitrator, a finding that the partial incapacity has ceased. Second, he says that the discretion exercised to give him ten weeks' extension was not a proper exercise of judicial discretion.

My Lords, it is very evident that the result of the Consolidating Order is to place workmen suffering from this particular disease in a very peculiar position. Here is a man who is undoubtedly partially incapacitated by a disease acquired from the circumstances of his employment, and who is not, as a person incapacitated by other diseases also acquired from the circumstances of employment, entitled to compensation until the employer can state and prove recovery, but his compensation ends abruptly at the end of six months, subject only to a possibility of prolongation in respect of exercise of a discretion as to which no indication is given as to how it should be exercised. But these considerations, although they inevitably suggest themselves, are matters for the Home Secretary, and not for this House. The appellant strongly urged that it could never be meant under the term "modification" to make it possible to impose a time limit of this sort, quite out of keeping with the general scheme of the Act. Unfortunately this argument, though possible, is useless to the appellant in this case, because it does not get him out of this dilemma. The particular disease is not in the Schedule attached to the Act. It only becomes an industrial disease in terms of the Order, but the Order does not introduce it as an industrial disease simpliciter, it only introduces it with this modification. If your Lordships were to hold that the modification as to the six months were ultra vires, and still held it to be an industrial disease, you would really be doing what the Secretary of State alone can do—namely, increasing the number of industrial diseases. I am therefore of opinion that it is impossible to give effect to the appellant's contention to hold the modification bad and yet hold the insertion of the disease good.

As to the second point, it is really very hard to express it in an intelligible form. The discretion given to the arbitrator is absolute. There are no indicia by which you can judge whether it is judicially exercised or not. If his finding were destroyed there is no power in the Act for an Appeal Court to substitute something else, and thus again the appellant is in the same sort of dilemma as he was in the first case.

I therefore move your Lordships that this appeal be dismissed with costs.

Lord Blanesburgh. My Lords, I agree.

Lord Buckmaster. My Lords, my noble and learned friends Lord Warrington and Lord Tomlin desire me to say that they have read the judgment already delivered and they agree with it.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 9, 1930.

Solicitor for the appellant: *A. Russell Jones.*

Solicitors for the respondents: *Gibbs, White & King, for Moxon & Petty, Newport, Mon.*

[HOUSE OF LORDS.]

H. L. (E.)* 1930 Dec. 15.

ARCHER-SHEE . . . . APPELLANT;

AND

GARLAND . . . . RESPONDENT.

Revenue—Income Tax—Foreign Possessions—Trust Fund—Foreign Trustees—Rights of Beneficiary under foreign Law—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schedule D, Case IV., Case V., rr.* 1, 2.

A testator, a subject of the United States, directed that his residuary estate should be held upon trust to dispose of the income thereof to the use of his daughter (now the wife of the appellant) during her life. The testator's residuary estate consisted wholly of foreign securities and foreign stocks and shares, and the existing trustees were an American trust company.

The appellant appealed against assessments to income tax made upon him in respect of his wife's income arising from the will under Case IV. and Case V., r. 1, as being income arising from foreign securities, stocks and shares, and chargeable to tax, whether received in the United Kingdom or not, and claimed that, by reason of the interposition of the title of the trustees, it should be assessed under Case V., r. 2, as being a foreign possession other than stocks and shares and chargeable only to the extent to which it was remitted to the United Kingdom. The assessments were ultimately upheld by the House of Lords upon the assumption that the American law was the same as the law of England: *Baker* v. *Archer-Shee* [1927] A. C. 844. Upon an appeal by the appellant against further assessments to income tax made upon him in respect of the same income for the three succeeding years, expert evidence was adduced as to the law of the United States to the effect that under that law the wife had no estate or interest in the securities, stocks or shares, but that her sole right was to compel the trustees to discharge their duties under the will:—

Held, as the result of this evidence, that the income in question was assessable under Case V., r. 2.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal reversing a judgment of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

Under the will of Alfred Pell, a citizen of the United States, who died in 1901, the testator's residuary estate was directed to be held, in the events which happened, to apply the whole income thereof to the use of his daughter Frances (now the wife of the appellant) during her life.

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, and LORD THANKERTON.

The trust fund consisted entirely of foreign securities and foreign stocks and shares.

The sole trustee of the will was the Trust Company of New York, a company resident in the State of New York.

The appellant appealed against assessments to income tax made upon him under Case IV. and Case V., r. 1, of Schedule D, in respect of the income coming to his wife under this will for the two years ending April 5, 1925, on the ground that the income in question was not income arising from securities, stocks or shares owing to the interposition of the title of the trustees under the will and that the income was therefore chargeable only under r. 2 of Case V. as being income from foreign possessions other than stocks and shares and to the extent only to which such income was remitted to the United Kingdom.

The Special Commissioners dismissed the appeal and their decision was affirmed by Rowlatt J.

The Court of Appeal (Lord Hanworth M.R., Warrington and Sargant L.JJ.) reversed the decision of Rowlatt J., but the House of Lords by a majority (Lord Atkinson, Lord Wrenbury, and Lord Carson; Viscount Sumner and Lord Blanesburgh dissenting) reversed the decision of the Court of Appeal and decided that the income in question was income coming to the appellant's wife from foreign securities, stocks or shares, and was chargeable to income tax whether remitted to the United Kingdom or not: *Baker* v. *Archer-Shee*. (1)

The appellant was further assessed in respect of the same income for the three years ending April 5, 1928, and on appealing to the Special Commissioners he adduced the evidence of two experts in the law of New York. The effect of this evidence is stated in the opinion of Lord Buckmaster. In effect the experts were of opinion that under the trusts of this will the appellant's wife, according to the law of New York, had no right to any specific interest or dividends

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(1) [1927] A. C. 844.

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at all, but that her right was to resort to a Court of equity to compel the trustees to discharge the duties imposed upon them by the will.

The Commissioners held that the differences between the American and English law proved before them were so great that the decision of the House of Lords on the previous appeal had no application, and they decided that the wife's income under the trust must be treated as derived from the trustees and not from the stocks, shares and securities, and was assessable under r. 2 of Case V.

Rowlatt J. affirmed the decision of the Commissioners.

The Court of Appeal by a majority (Lord Hanworth M.R. and Lawrence L.J.; Greer L.J. dissenting) reversed the decision of the learned judge on the ground that the American law and the rights of the appellant's wife thereunder did not materially differ from the law and rights on which the majority of the Lords based their opinions in *Baker* v. *Archer-Shee*. (1)

1930. Nov. 18, 20. *Latter K.C.*, *Gavin Simonds K.C.* and *Edwardes Jones K.C.* for the appellant.

Sir William Jowitt A.-G., *Sir Stafford Cripps S.-G.* and *Reginald Hills* for the respondent.

[The following authorities were referred to: *Baker* v. *Archer-Shee* (1); *Macfarlane* v. *Inland Revenue Commissioners* (2); *Murray* v. *Inland Revenue Commissioners* (3); *Williams* v. *Singer* (4); *Drummond* v. *Collins* (5); *Syme* v. *Commissioner of Taxes*. (6)]

The House took time for consideration.

1930. Dec. 15. LORD BUCKMASTER. My Lords, the appellant is, by General Rule 16 of the Income Tax Acts, assessable to income tax in respect of the profits of his wife. Her father was a citizen of the United States of America, and under his will, made in New York, she is entitled to receive during her life the income of his residuary estate which is held at present by the Trust Company of New York as executor and trustee of the will. Part of such moneys are remitted to this country by the trustee and about these no question is raised, but part remain in New York and the liability of the appellant to have these retained moneys assessed for income tax is the sole question on this appeal.

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(1) [1927] A. C. 844.

(2) 1929 S. C. 453.

(3) 1926 S. L. T. 714; 11 Tax Cas. 133.

(4) [1921] 1 A. C. 65; 7 Tax Cas. 387; [1919] 2 K. B. 108.

(5) [1915] A. C. 1011.

(6) [1914] A. C. 1013.

The early history of the case and all material facts are to be found in [1927] A. C., p. 844, which contains the report of the decision when the same dispute as the present was considered by this House under different circumstances. The explanation of why, notwithstanding that decision, this case is again presented to your Lordships lies in the fact that the will of the appellant's father-in-law under which the property passed was then construed according to English law, and, so regarded, it was held that the interest of the appellant's wife was derived from stocks, shares or funds outside the United Kingdom and therefore by r. 1 of Case V. was assessable to income tax whether received here or not. The question as to what might happen if the American law differed from the English was left open. Such decision covered the claims up to April, 1925, but since then three assessments have been made in accordance with the law then laid down, and these are the assessments now in dispute. It is obvious, therefore, for the appellant to succeed he must show that the American law differs in a crucial respect from the law of England, and that the former judgment has accordingly lost its force, and this he now claims to have done.

His contention was accepted by the Commissioners and Rowlatt J., but not by the Court of Appeal who, with the dissent of Greer L.J., once more found against the appellant.

To make the point now in issue quite plain it is necessary again to refer to the statute and the rules.

Under Schedule D. (1.), a tax is charged in respect of—

"(*a*) The annual profits or gains arising or accruing—

"(i) to any person residing in the United Kingdom from

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any kind of property whatever, whether situate in the United Kingdom or elsewhere."

This general provision is then separated into six different cases under which the tax is to be charged, the fourth and fifth of which are the ones relevant to this appeal. They are as follows :—

"Case IV.—Tax in respect of income arising from securities out of the United Kingdom, except such income as is charged under Schedule C;

"Case V.—Tax in respect of income arising from possessions out of the United Kingdom."

Except that these two cases appear to overlap, the matter seems so far clear, but the mists begin to fall when the rules are examined, "subject to and in accordance with" which the tax is to be charged, for it is then found that two distinct methods of computation and two distinct liabilities apply to different classes of property under these two Cases.

It will be noticed that Case IV. applies only to what is called "income arising from securities," and r. 1 under it provides that the tax is in that case to be "computed on the full amount thereof arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not," and this differs from the rules under Case V., which create the present difficulties. The rules in question are 1 and 2, and their material portions are as follows :—

"1.—The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I., whether the income has been or will be received in the United Kingdom or not, ...

"2.—The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, ... on an average of the three preceding years as directed in Case I., without any deduction or abatement other than is therein allowed."

If, therefore, the income in this case is income "arising from stocks, shares or rents," it must be computed on a three years' average, and is liable to be taxed whether received in the United Kingdom or no, but if it is not it is still computed on a three years' average but only "on the full amount of the actual sums annually received in the United Kingdom."

It is not for us to inquire into the reason for this change; we assume a reason to exist, and that it is wise and just. We are concerned only with whether r. 1 or r. 2 applies. That when this matter was formerly raised r. 1 applied was determined by this House by Lords Wrenbury, Carson and Atkinson (Lords Sumner and Blanesburgh dissenting). (1) Lord Wrenbury's judgment was expressly concurred in by Lord Atkinson, who added no further reasons of his own.

It is, therefore, extremely important to see why Lord Wrenbury and Lord Carson formed this opinion, and the report enables this to be accurately determined. Lord Wrenbury (at p. 866) says: "Lady Archer-Shee (if American law is the same as English law) is, in my opinion, as matter of construction of the will, entitled in equity specifically during her life to the dividends upon the stocks," and on the same page he repeats this conclusion again made dependent upon the hypothesis of the identity of the law in the two countries. He there says: "It is, I think, if the law of America is the same as our law, an equitable right in possession to receive during her life the proceeds of the shares and stocks of which she is tenant for life."

Lord Carson (at p. 870) supports the same opinion in these words: "Upon the construction of the will of Alfred Pell once the residue had become specifically ascertained, the respondent's wife was sole beneficial owner of the interest and dividends of all the securities, stocks and shares forming part of the trust fund."

Now the construction of the will was there the construction according to English law, the principles and effect of which had been enunciated by Lord Wrenbury. This opinion was not in accordance with that of Lord Sumner, who supported the judgment of Sargant L.J. in the Court of Appeal where adopting the view and the language of Rowlatt J. he said this (1): "'What this lady enjoys is not the stocks, shares and rents or other property constituting the trust fund under the will; what she has is the right to call upon the trustees, and, if necessary, to compel the trustees to administer this property during her life so as to give her the income arising therefrom according to the provisions of the trust. Her interest is merely an equitable one, and it is not an interest in the specific stocks and shares constituting the trust fund at all.'"

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(1) [1927] A. C. 844.

This was the opposite view to that held in this House, and it was because it was decided that it did not define accurately Lady Archer-Shee's position under the will according to English law that the decision was given in favour of the Crown.

The evidence of two American lawyers has now been given in the matter on behalf of the appellant and no one has been called to contradict their statements.

Mr. Richard Powell, a Professor of Law at Columbia University Law School in the City of New York, stated that the provision of the law which directs who shall hold and own the property of a trust was as follows: "Every express trust valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees in law, and in equity, subject only to the execution of the trust period. The persons for whose benefit the trust is created shall take no estate or interest in the lands, but may enforce the performance of the trust in equity."

This provision, although it relates in terms only to lands, had been held to be equally applicable to personal property, and again he said "that Lady Archer-Shee had no right to any specific dividends or interest at all," and he explained her rights in these words: "While it was true that under the trust in question (there being no provision for accumulation) the whole of the net income (including in the event of death any income accrued but not paid over) must ultimately be either paid over to or applied for the benefit of Lady Archer-Shee, the manner and times of doing so were within the discretion of the trustees subject to judicial supervision; that if the trustees exercised their discretion unconscientiously, Lady Archer-Shee had the right to ask the Court to supervise their behaviour in the matter both of the management of the income and of the capital of the Trust."

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(1) [1927] 1 K. B. 109, 128.

This opinion was confirmed by a member of a legal firm of old standing in New York, and is uncontradicted.

The Master of the Rolls thinks that the latter part of the statement I have quoted "in essentials appears to accord with the statements" of Lord Wrenbury. The same question often presents itself to different minds under different aspects; to my mind the statement which must be taken with the other words I have quoted differs in every essential from Lord Wrenbury's views. At its highest it does no more than express what Sargant L.J. thought, but erroneously, was the English law, and it was this that Lord Wrenbury rejected.

I cannot reconcile the statement of the American lawyer that Lady Archer-Shee had "no right to any specific dividends or interest at all" with the statement of Lord Wrenbury that she was "entitled in equity specifically during her life to the dividends upon the stocks." Nor, again, can I reconcile the statement that she took "no estate or interest" in the funds, though she might enforce the performance of the trust in equity with the statement of Lord Carson that under English law she was sole beneficial owner of the interest and dividends of all the stocks and shares.

In my opinion the difference between the two systems of law cannot be better explained than by contrasting the judgments of Lords Sumner and Blanesburgh in the House of Lords, and that of Sargant L.J. in the Court of Appeal with that of Lords Wrenbury, Carson and Atkinson which there prevailed. These former learned judges were held to have imperfectly enunciated the English law, but they have expressed with perfect clearness what we now know is the Amercian law, which is the law we are bound to apply.

This to my mind ends the case, but the Attorney-General pressed on us with such insistence the case of *Williams* v. *Singer* (1) that I feel some comment is necessary.

In that case the trustees of an English settlement were domiciled in this country, but the tenant for life was a French subject by marriage and domiciled abroad.

The income of the settled fund was paid under orders of the trustees direct to the tenant for life at a bank in New York.

In those circumstances assessments were made on the trustees, and these assessments were set aside by this House. One sentence from the judgment of Lord Cave L.C. will serve to show how little to the present purpose is the consideration of that authority. He says, p. 72: "The object of the Acts is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found. If the beneficiary receives them he is liable to be assessed upon them. If the trustee receives and controls them, he is primarily so liable." The case of *Syme* v. *Commissioner of Taxes* (2) again is no assistance. The tax was there assessed upon income "derived by any person from personal exertion," and this was by the statute declared to include "income arising or accruing from any trade" although not arising from the taxpayer's own personal exertion or trade. Under the provisions of a will trustees carried on a business and paid the appellant one-fifth of the profits, and on these the tax was held duly assessed under the provisions already quoted. It is rarely profitable to attempt the interpretation of one statute by another, and in this case the mere comparison of the language shows it to be useless. The former decision in the case shows that an absolute ownership of the stocks, shares and dividends is not necessary; a limited ownership is sufficient to satisfy the rule, but it shows also that such ownership must be specific in relation to the subject, and the opinion on which we are bound to act shows that is not the true position of Lady Archer-Shee. For these reasons I think this appeal should be allowed.

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(1) [1919] 2 K. B. 108; [1921] 1 A. C. 65.

(2) [1914] A. C. 1013.

VISCOUNT DUNEDIN. My Lords, the first and indeed crucial point of this case is to make up one's mind as to what was the true ratio decidendi in the former case as to the same source of income in this House, for by that decision we are bound. I think the ratio decidendi very clearly appears by comparing the judgment of Viscount Sumner, who was in the minority, with the majority judgment which prevailed. Viscount Sumner thought that the specific property in the stocks, shares, securities, and other investments which formed the trust fund, was in the hands of the trustees, and that accordingly what the beneficiary in this country got was what came to her from a foreign possession—namely, her right to get the trustees to make payment to her of the balance of the income. That view was rejected by the majority on the view that there was in the beneficiary a specific equitable interest in each and every one of the stocks, shares, etc., which formed the trust fund, and that the case fell either under Case IV., or, in so far as the funds consisted of stocks and shares, under r. 1 of Case V., and they remitted the case to find out the exact constituents of the fund. That case was decided without inquiry as to the law of New York. It is obvious that the judgment of the majority turns upon an assumption that the law of New York is what they declared the English law to be.

Now, in the present case, the law of New York has been inquired into, and we have heard the testimony of the lawyers examined. In face of that testimony it seems to me quite an impossibility to hold that, according to that law, there is a specific equitable interest in the beneficiary in each parcel of securities, stocks, etc. The interest of the beneficiary is just what Viscount Sumner thought it was in the former case. Accordingly I think the appeal must be allowed and the judgment of Rowlatt J. restored, for the income of

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Lady Archer-Shee is drawn from a foreign possession and falls under r. 2 of Case V.

LORD TOMLIN (read by LORD THANKERTON). My Lords, the answer to the question which falls to be determined on this appeal depends in my opinion first upon the effect of the decision in your Lordships' House in *Baker* v. *Archer-Shee* (1), and secondly, upon the conclusion as to American law to be drawn from the evidence of the American lawyers.

I do not think it can be doubted that the majority of your Lordships' House in the former case founded themselves upon the view that according to English law (with which, in that case, American law was assumed to be identical) the appellant's wife had a property interest in the income arising from the securities, stocks and shares constituting the American trust, and that but for the existence of that supposed property interest the decision would have been different.

The evidence upon American law adduced before the Commissioners in the present case contains statements to the effect that the whole estate in law and in equity in the trust funds is vested in the trustees, and that the words of the trust give to the appellant's wife merely the right to resort to a Court of equity to compel the trustees to discharge the task imposed upon them, which was to apply the money which they receive as a net income from the trust to her use, that they have within the limits of reasonable and conscientious behaviour an absolute discretion as to the application of the income for her benefit, that if they decided to apply the money for her benefit instead of paying it over they must exercise the power to do so reasonably, and that she had no right to any specific dividends or interest at all.

In the face of these statements I think the finding of fact must necessarily be that according to American law the appellant's wife has no property interest in the income arising from the securities, stocks and shares constituting the trust fund but has only a chose in action available against the trustees.

(1) [1927] A. C. 844.

Applying the principle of the previous decision of your Lordships' House to the case with the fact as to American law found as I have indicated it should in my opinion be found, I reach the conclusion that the assessable income, the subject of the appeal, is income arising from a possession out of the United Kingdom other than stocks, shares or rents—namely, a chose in action available against the American trustees—and that the assessment should be made not under Case IV. and Case V., r. 1 of Sch. D, but under Case V., r. 2, of that Schedule.

The appeal therefore in my opinion succeeds.

LORD THANKERTON. My Lords, I concur in your Lordships' opinion.

LORD BUCKMASTER. My Lords, my noble and learned friend Lord Warrington of Clyffe has asked me to say that he agrees with the judgment which I have read.

Order of the Court of Appeal reversed and judgment of Rowlatt J. restored. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Dec. 15, 1930.

Solicitors for the appellant: *Lewis & Lewis.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

[PRIVY COUNCIL.]

J. C.*
1930
Nov. 17.

COMMISSIONER OF TAXES . . . . APPELLANT;

AND

BRITISH AUSTRALIAN WOOL REALIZATION ASSOCIATION, LIMITED (IN LIQUIDATION) . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Australia (Victoria)—Income Tax—Company—Realization of Capital Assets—"Profits earned in or derived in or from Victoria"—Income Tax Act, 1915 (Victoria; 6 Geo. 5, No. 2668), s. 35.

Pursuant to an agreement between the Imperial and Commonwealth Governments, the respondent company was incorporated in 1920 in Victoria, with a head office at Melbourne, for the purpose of selling the undisposed of surplus of wool acquired for the war, and distributing the proceeds. The Commonwealth Government transferred to the company its undivided half of the Australian wool and in cash its share of profits already realized, in consideration of the issue of priority wool certificates and fully-paid shares to its nominees, the wool suppliers. The company also agreed with the Imperial Government to sell on its behalf for a commission all the rest of the wool, whether Australian or not. The wool was all sold during the years 1921 to 1924; the company had no other dealings in wool. The contracts of sale were made, and deliveries and payments thereunder took place, outside Australia. The proceeds of the half share of the Australian wool largely exceeded the sum at which it had been taken into the books of the company. The priority wool certificates were redeemed, and the whole of the capital credited as paid on the shares was paid off under successive schemes sanctioned by the Court; there remained a large surplus in the hands of the liquidator of the company. Assessments were made upon the company under the Income Tax Act, 1915, of Victoria, in respect of proportions of the surplus proceeds of sale and of the commission earned. The company raised objections thereto, and a special case was stated:—

Held, (1.) that the surplus resulted merely from the realization of capital assets, and therefore no part of it was income chargeable to tax under s. 35 of the Act; (2.) that no part of the surplus, or of the commission, was a profit "earned in or derived in or from Victoria" so as to be chargeable to tax under that section.

Grainger v. *Gough* [1896] A. C. 325 and *Lovell & Christmas, Ld.* v. *Commissioner of Taxes* [1908] A. C. 46 applied.

Judgment of the Supreme Court of Victoria affirmed.

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* *Present:* LORD SANKEY L.C., LORD BLANESBURGH, LORD MERRIVALE, LORD HANWORTH M.R., and LORD RUSSELL OF KILLOWEN.

Appeal (No. 100 of 1929) from a judgment of the Supreme Court of Victoria (May 7, 1929) upon a special case stated for the opinion of that Court under s. 59, sub-s. 3, of the Income Tax Act, 1915, of Victoria.

The special case was stated by agreement upon objections raised by the respondent Association to assessments made upon it by the appellant under the above mentioned Act for the financial years 1921 to 1925.

By s. 35 of the Act: "So far as regards any company liable to pay tax, the income thereof chargeable with tax shall . . . . be the profits earned in or derived in or from Victoria by such company during the year immediately preceding the year of assessment."

The facts appear fully from the judgment of the Judicial Committee, and so far as the assessments were in respect of the surplus of sale proceeds of the half share of the Australian wool over the value at which it was taken into the books of the company, and of the commission earned by sales on behalf of the Imperial Government, they are shortly stated in the headnote.

Realization accounts were prepared by the company at the end of each year showing the amount by which the proceeds of sale attributable to the half share of the Australian wool exceeded a due proportion of the 13,957,105*l.* at which that share had been taken into the books of the company.

In 1926 the appellant made assessments upon the respondent company in respect of each of the financial years, beginning on July 1, 1921 to 1925. Included in the assessments were: (1.) 1,025,251*l.*, being a quarter of the amounts shown by the realization accounts, less allowances for expenses; (2.) 44,697*l.*, being two-fifths of the commission earned. The proportions of a quarter and two-fifths were the proportions of the respective items which the appellant regarded as being earned in or derived in or from Victoria within the meaning of s. 35 of the Act. There was also an assessment in respect of a sum of 137,696*l.*, which was a profit made by the Commonwealth Government out of separate transactions and handed over to the company.

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The special case was argued in the Supreme Court before McArthur, Macfarlan, and Wasley JJ., who declared that the assessments should be amended by excluding (subject to exceptions not material to this report) the amounts objected to by the company.

McArthur J., with whose judgment Wasley J. concurred, was of opinion that the surplus proceeds of sale was not the result of trading but of the realization of capital assets, and that it was therefore not taxable under the Act. Macfarlan J. held that the surplus proceeds were trading profits, but that they were not "profits earned in or derived in or from Victoria" within s. 35 of the Act, and therefore were not taxable. All three judges held that the commission, though admittedly profits, was not taxable, as it was not within the above words of s. 35.

1930. March 17, 18, 20, 31; April 1. *Sir Boyd Merriman K.C.* and *R. P. Hills* for the appellant. The surplus of sale proceeds was taxable income according to the test laid down in *Californian Copper Syndicate* v. *Harris* (1), as it was a gain made in the operation of business in carrying out a scheme for profit making. That test was approved by the Board in *Commissioner of Taxes* v. *Melbourne Trust* (2), and by the House of Lords in *Ducker* v. *Rees Roturbo Development Syndicate.* (3) Though the Association may have been formed with a view of realizing the wool, that object was carried out by the machinery of a wool selling company. The operations of the company extended over three or four years, and it controlled the wool market. In addition to the two decisions last named the appellant relies upon the judgment of Rowlatt J. in *Rees Roturbo Development Syndicate* v. *Ducker* (4); *Martin* v. *Lowry* (5); *J. & R. O'Kane & Co.* v. *Inland Revenue Commissioners.* (6); and *Alabama Coal, etc., Co.* v. *Mylam* (7). In *Ruhamah Property Co.* v. *Federal Commissioner*

(1) (1904) 6 F. 894, 898; 5 Tax Cas. 159, 165.

(2) [1914] A. C. 1001, 1010.

(3) [1928] A. C. 132, 140.

(4) (1927) 13 Tax Cas. 366, 378.

(5) [1926] 1 K. B. 550; [1927] A. C. 312.

(6) (1922) 12 Tax Cas. 303 (H. L.).

(7) (1926) 11 Tax Cas. 232.

of Taxation (1), which was relied upon by the majority of the Supreme Court, there was no operation of business. Further, the assessment in this case was in respect of the proceeds of the sale of trading stock, and was therefore assessable income under the Income Tax Acts Amendment Act, 1923.

In the circumstances of the case a proportion of the surplus sale proceeds, and of the commission, was rightly assessed as profits earned in or derived from Victoria: *Commissioners of Taxation* v. *Kirk* (2); *Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax (Q.).* (3) The Supreme Court relied on *Grainger* v. *Gough* (4) and *Lovell & Christmas, Ld.* v. *Commissioner of Taxes* (5), but those decisions related to Acts differently worded, and to the liability of a non-resident. The respondent company was resident in Victoria, the contracts were made upon its behalf, and the proceeds were paid over to it in Victoria. Further, part of the wool was grown in Victoria. The appellant had power to treat part of the profit as having been earned in Victoria: *Federal Commissioner of Taxation* v. *Lewis Berger & Sons (Australia), Ld.* (6); *Mitchell* v. *Federal Commissioner of Taxation.* (7) The apportionment made is conclusive save for error in law.

Latter K.C. and *Wilfrid Barton* for the respondents. The surplus proceeds of sale was the result of realization, not of trading for profit, and was therefore not income or profits liable to taxation under the Act of 1915. The company was formed to continue the realization of the wool, and it was precluded from other transactions. The wool was not taken into the books of the company at any real valuation. That was not necessary, as the shareholders contributed neither wool nor cash. It is well established that a company may exist merely for the purpose of realization, and that so far as that purpose is carried out it is not liable to income tax: *Assets Co.* v. *Forbes* (8); *Rand* v. *Alberni Land Co.* (9) That principle is recognized in Australia: *Ruhamah*

(1) (1928) 41 C. L. R. 148.
(2) [1900] A. C. 588.
(3) (1923) 33 C. L. R. 76.
(4) [1896] A. C. 325.
(5) [1908] A. C. 46.
(6) (1927) 39 C. L. R. 468.
(7) (1928) 34 Argus L. R. 25.
(8) (1897) 3 Tax Cas. 542.
(9) (1920) 7 Tax Cas. 629.

Property Co. v. *Federal Commissioner of Taxation.* (1) Lord Dunedin, in delivering the judgment of the Board in *Commissioner of Taxes* v. *Melbourne Trust* (2), said: "If the liquidator of one of the banks had made an estimate of the various assets held by him for realization, and then on realization had obtained more than that estimate, such surplus would not have been profit assessable to income tax." That observation applies precisely to this case. The facts resemble those in *Hudson's Bay Co.* v. *Stevens* (3).

But whether the operation of the company was merely that of realization or not, neither the surplus proceeds of sale nor the commission was earned in or derived in or from Victoria so as to be assessable under s. 35 of the Act. The making of the contracts was entirely in the hands of the British board, who operated in Great Britain. That part of the company's business must be taken to have been delegated to them under art. 81. Deliveries under the contracts and payments by buyers were also made outside Australia. *Grainger* v. *Gough* (4) and *Lovell & Christmas Ld.*, v. *Commissioner of Taxes* (5) are authorities that in the above circumstances the trade or business giving rise to the profit was not one carried on in Victoria. Although the language of the Victorian Act differs from that of the Acts there considered the decisions apply: *Commissioners of Taxation (N. S. W.)* v. *Meeks* (6); *Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax (Q.)* (7); *Commissioner of Taxation (W. A.)* v. *D. & W. Murray, Ld.* (8) Further, as the Act taxes only profits made wholly in Victoria there cannot be an apportionment between Victoria and elsewhere. The decisions of the High Court of Australia recognizing the principle of apportionment arose under Acts of other States in which the language differs from that of the Victorian Act. In any case, an apportionment to be valid must depend upon some legal basis; here it was made arbitrarily. There was no finding by the Commissioner binding upon the Court upon hearing the special case.

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(1) 41 C. L. R. 148.

(2) [1914] A. C. 1001, 1009.

(3) (1909) 5 Tax Cas. 424.

(4) [1896] A. C. 325.

(5) [1908] A. C. 46.

(6) (1915) 19 C. L. R. 568, 587.

(7) (1923) 33 C. L. R. 76, 110.

(8) (1929) 42 C. L. R. 332 (since reported).

The appellant cannot now rely upon the Act of 1923. Although it is referred to in his case upon this appeal, it was not relied on in the Supreme Court, nor was its effect there considered. In any case, the Act does not apply if, as the respondents submit, the wool was not trading stock but a capital asset under realization.

Sir Boyd Merriman K.C. replied.

Nov. 17. The judgment of their Lordships was delivered by

Lord Blanesburgh. This appeal arises out of assessments to income tax in respect of each of the five financial years beginning on July 1 in 1921, 1922, 1923, 1924 and 1925, made upon the respondent Association by the Commissioner of Taxes for Victoria under the Victorian Income Tax Act, 1915. The assessments were all of them notified on, and none of them before July 21, 1926. When so notified the Association, by that time in liquidation, objected to them under s. 56 of the Act; the Commissioner disallowed the objections and, in pursuance of s. 57, was required by the Association to transmit them to be heard and determined by a judge of county courts. The learned judge of the county court at Melbourne to whom they were duly transmitted, stated, upon the application of both parties, a special case, and referred the whole matter for the opinion of the Supreme Court of Victoria under s. 59 of the Act. The Full Court on the case so stated decided that certain amounts which for the purposes of the assessments had been included in the taxable income of the Association were not chargeable to income tax, and on May 7, 1929, ordered the assessments to be remitted to the county court judge for amendment accordingly. The present appeal by the Commissioner to His Majesty in Council is an appeal from that order.

Their Lordships have thought it convenient to set forth in some detail the steps by which in accordance with the statute the questions at issue reached the Supreme Court

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and now come before the Board. They have done so in order that there may at once be made apparent the essential difference between the judicial task under the Victorian statute and that set the Court on a case stated by the Special Commissioners under the British Income Tax Acts. The duty of their Lordships, in the present case, as it was the duty of the Supreme Court, is to determine whether on all the facts stated by the learned county court judge, as properly appreciated, the Association is assessable to income tax in respect of each or any of the sums still in debate. The question for the Board is not that which in closely analogous circumstances would be submitted to the Court under the British statute which leaves all question and inferences of fact to the Special Commissioners whose decision is conclusive and binding on the Court if there was any evidence to support it. It is important to bear in mind the differing rôles of the Court under the two systems. It is, for instance, only by doing so that the limits of applicability can definitely be assigned to many of the judicial decisions under the British statute bearing upon questions analogous to those now again in issue.

Of the items originally brought into charge by the Commissioner some are no longer in controversy. In the course of the proceedings they have been either abandoned or conceded. Three, however, presently to be particularized and amounting in the aggregate to a very large sum remain in dispute and must now be dealt with by their Lordships.

The liability, if any, of the Association to Victorian income tax in respect of them arises under s. 35 of the Act of 1915, which, by its terms immediately relevant, provides that " so far as regards any company liable to pay tax, the income thereof chargeable with tax shall . . . . be the profits earned in or derived in or from Victoria by such company during the year immediately preceding the year of assessment."

Upon that section it is convenient to note in passing that the Association is under it " a company liable to pay tax," not specially because it was a company incorporated in Victoria with its registered office at Melbourne, but because the word "company" as there used is made by s. 4 to include "every corporate company howsoever incorporated and whether under the laws of Victoria or any other country and whether its head or principal office or principal place of business is in Victoria or elsewhere." It is convenient also to note at once that under the section the income of the Association to be brought into charge must answer the description of being not only "profits earned" but of being "profits earned in or derived in or from Victoria" by the Association. Each of these matters will presently be found to be highly important.

It is not, however, the wording of the section that in this case presents the real difficulty. In themselves its terms are clear enough. One matter upon which there might have been room for discussion must now be taken to be settled—namely, that it is income profits as distinct from an appreciation in value ascertained by the mere realization of a capital asset that are by the section brought into charge: cf. *Ruhamah Property Co.* v. *Federal Commissioner of Taxation.* (1) That difficulty out of the way, the enactment is not in other respects of doubtful import. The trouble is to apply its provisions to the facts of a case so altogether exceptional in its incidents as is the present. As will immediately appear, it is perhaps not too much to say that the circumstances leading to the formation of the Association were probably without precedent, and its activities while it existed were possibly in extent and certainly in character without parallel. The mere magnitude of its operations, with the attendant organization to which the Association succeeded, may, if necessary vigilance be not exercised, well result in a misconception of their essential character.

Of the three questions which still remain for decision, the first and most important is whether a sum of approximately 4,101,404*l*. remaining after all share capital has been repaid and representing for the most part surplus receipts by the Association from the realization of an immense quantity of wool made in circumstances and under a title later to be stated, is to that extent a capital appreciation of, or is a profit earned by the Association, and as to some proportion of it at all events (the Commissioner suggests one-fourth), earned in or derived in or from Victoria. The second question relates to certain sums of commission received by the Association on the realization by it of wool belonging to the Imperial Government. These commissions were admittedly all of them profits earned by the Association. Were they as to any part of them earned in or derived by it in or from Victoria? The third question relates to two sums each of 68,848*l.* 7*s.* 9*d.* and aggregating 137,696*l.* 15*s.* 6*d.* made over to the Association by the Commonwealth Government in the years 1923 and 1924 respectively and representing a profit realized by that Government from a sale of wool to a company called the Wool Combing and Spinning Company, Ld. Was this receipt something which could properly be brought into charge either as a profit earned at all, or as a profit earned in or derived in or from Victoria by the Association?

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(1) 41 C. L. R. 148.

The members of the Supreme Court agreed in the conclusion that no one of these three items formed part of the taxable income of the Association. Even if the third item represented a profit of the Association in any sense—and it was certainly the opinion of Macfarlan J., and possibly of his colleagues also, that it did not—each of them took the view, that neither that item nor, as they held, the commissions referred to in the second question, had been earned in or derived in or from Victoria.

With regard to the main item in dispute—that first above mentioned—the learned judges also agreed in holding that it formed no part of the taxable income of the Association. But for different reasons. McArthur J. (with whose judgment Wasley J. concurred) was of opinion that the sum in question could not be regarded as in the statutory sense "a profit earned" by the Association. Macfarlan J., on the other hand, held it to represent part of the Association's ordinary trading profit. It was, however, not to be included in its

Victorian taxable income because it had not, in his judgment, been earned in or derived in or from Victoria.

The elaborate facts on the true effect of which, of course, everything depends, are set forth in great detail in the special case and in the annexures thereto. They are discussed also in the judgments delivered in the Supreme Court. Those to whom this judgment is primarily addressed are already familiar with them all. Accordingly, in what follows their Lordships will concentrate primarily on the aspects of the case which have most helped them to reach their conclusions upon it, touching only upon such other facts as must be stated to make their judgment self-sufficient.

The transaction leading up to the claim of the Commissioner was an arrangement concluded in 1916 between the Government of the Commonwealth of Australia and the Imperial Government under which for the satisfaction of British and Allied war requirements the Imperial Government acquired through the Commonwealth Government the whole of the Australian wool clip for the wool season 1916–1917, upon the terms of paying for it on the basis of a flat rate of 15½ pence per pound greasy wool f.o.b. Australia with a further prescribed sum per pound for handling charges. Before the end of that wool season the arrangement was continued for the wool year 1916–1917, and in June, 1918, was further prolonged, with some slight variation in handling charges, for the duration of the war, and for a further period which, in the event, terminated on June 30, 1920—the end of the wool year 1919–1920. Some idea of the magnitude of the transaction and of the payments involved may be gauged from the facts that the suppliers, great and small, numbered approximately 150,000, located all over Australia, and that the total price paid by the Imperial Government for the wool acquired amounted to 153,743,857*l.*

For the purpose of giving effect to the arrangement and of acquiring on behalf of the Commonwealth Government the entire clip from the suppliers, there was constituted by that Government a Central Wool Committee with, in each State, a wool committee subordinate to it. To the Central Wool

Committee was assigned, in accordance with published statutory regulations, and subject to the directions of the Prime Minister of the Commonwealth, the entire working out of the arrangement with the Imperial Government. No wool was compulsorily acquired, but as the sale of Australian wool was, by the regulations, prohibited except through, or to, or with the consent of, the Central Wool Committee, it became possible for that Committee to purchase substantially the whole of the wool of the various clips at prices so adjusted on appraised values that the total sum paid for the clip of the year was equal to a sum arrived at by multiplying the total quantity of pounds supplied by 15½ pence. The price was not inadequate. It represented the average of prices obtained by growers in 1913–14, with an addition of 55 per cent. And it was fixed, so that in the event of the market price falling below it the burden fell on the Imperial Government. But as between the two Governments it was final, only as regarded the wool used for war purposes. Because the Imperial Government announced that "in the event of profit being realised from the sale of any surplus which might remain over after military requirements of the British and Allied armies had been satisfied His Majesty's Government would propose, after payment of all expenses, to share such profits with the Government of Australia."

This share that Government in turn publicly declared its intention to allocate amongst the suppliers. "From time to time," says the special case, "between the months of November, 1916, and August, 1919, statements were made in Parliament by different Ministers of State for the Commonwealth of Australia to the effect that the Australian share of any profits made by the Imperial Government by the sale of any wool . . . . would not be retained by the Commonwealth Government but would be distributed amongst the suppliers of wool in Australia." The interests in wool certificates and shares of the Association presently to be stated given to the larger suppliers and the substituted sums in cash paid at the time of its formation to the smaller suppliers was the fulfilment by the Commonwealth Government of that promise.

But it must here be noted—the fact becomes very relevant in the sequel—that, as was laid down by the High Court of Australia in *John Cooke & Co.* v. *The Commonwealth* (1), and in effect affirmed by this Board (2) on appeal, the whole arrangement just summarized was one not cognizable in a Court of law. As to the Commonwealth Government's share of surplus profits, again the question of its distribution or retention was, as between the two Governments, a matter for the Commonwealth, and its distribution when resolved upon by that Government was in point of law left, by the regulations, to the wisdom, fairness and discretion of the Central Wool Committee. In other words, no individual supplier, however important, ever had in the eye of the law prior to the formation of the Association a right to any part of the Commonwealth Government's share of profit.

To some of the suppliers this judicial pronouncement was fundamental. In the case in which it was made, the decision was that the discretion had been legally exercised by the Central Wool Committee when it decided to exclude from participation altogether the suppliers of skin wool during two seasons. For the purposes of the present case, however, the pronouncement is chiefly important in that it emphasises the fact that the Commonwealth Government, or the Central Wool Committee acting on its behalf, was free to prescribe and did prescribe the principles upon which the divisible surplus profit accruing to itself should be apportioned amongst the suppliers throughout all Australia. Difficulties, possibly insuperable, must have arisen if the final division had not been one to be dictated by somebody. To translate either by agreement or judicial decision the necessarily vague Ministerial statements of intention into a definite and detailed scheme of distribution amongst a multitude of participants differently situated might well have proved to be an impossible task. It had not to be attempted. Through the medium of the Association a prescribed apportionment was made by direction of the Central Wool Committee on behalf of the Commonwealth Government. The fact that strictly it was only as a result of his being nominated for benefit by that Committee that any supplier became possessed of or entitled to his certificates and shares in the Association may, as will presently appear, have a bearing on the first and principal question raised on this appeal.

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(1) (1922) 31 C. L. R. 394.

(2) (1924) 34 C. L. R. 269.

In addition to the Australian clips so purchased, the Imperial Government also acquired the wool grown in other Dominions and Colonies during the same seasons, and at the date of the treaty of peace with Germany large quantities of (*a*) the surplus wool, and (*b*) the wool acquired from other Dominions and Colonies, the so-called "New Zealand" wool, was in store. Both before and after the Armistice the Imperial Government realized by sales to civilian purchasers very large quantities of surplus wool, and in September, 1920, paid to the credit of the Commonwealth Government the sum of 6,486,992*l.* as a first payment on account of the promised share of profits resulting from these sales. The Central Wool Committee announced its intention to distribute amongst the suppliers in proportion to the originally appraised value of the wool acquired from each that sum, together with a further amount of 1,166,500*l.* held by the Committee and representing receipts over expenses in the handling of the wool, and in October, 1920, the total sum of 7,653,202*l.* was so distributed by the Committee. The Association was not then in existence. It was not the medium of distribution of the first payment, and no question of income tax with reference to it, except in the hands of its Victorian recipients, has ever been raised by the Commissioner.

But great quantities of surplus wool still remained unrealized in the hands of the Imperial Government. On December 31, 1920, the amount was not less than 1,836,005 bales. Manufacturers' stocks of raw material had through the sales aforesaid been replenished. Prices were falling. Demand was small. The situation became critical. To throw upon the market this vast quantity of wool when the post-war clips were becoming available for sale must have resulted in the gravest injury to Australian wool-growing, while at the same time the British textile industry was not to be deprived of the opportunity of obtaining ample supplies of wool at the lowest price possible. In other words the particular, as distinguished from the Imperial, interests of Great Britain on the one side and of Australia on the other, had in this matter of realization become divergent. The situation made clear in the annexures thereto is thus described in the special case itself: "For some time after November, 1918, no difficulty was experienced in finding a good market for wool, but by the year 1920 woollen manufacturers had replenished their stocks of raw material, and because of the tendency of the market to drop and the uncertainty about future prices were not buying wool freely. Moreover, after June 30, 1920, the current clip of Australian wool which had not been acquired by the Imperial Government under the aforesaid arrangements was outside Government control and became available for sale in competition with the surplus wool. Prices for wool began to drop and a danger arose that if both the current clip wool and large quantities of the said surplus wool were put on the market at the same time, the market would collapse, the prices realized for both would be unsatisfactory and the wool industry in Australia would receive a grave set back. On the other hand there were certain interests in England pressing the Imperial Government to place on the market the surplus wool in large quantities in competition with the current clip wool."

Negotiation with a view to meeting the crisis that threatened both in Australia and Great Britain then took place between, on the one side, the Commonwealth Government, and on the other, the Imperial Government acting through the Ministry of Munitions. The incorporation of the Association was one of the results of that negotiation. The objects of attainment on either side, and the manner in which, through the Association, these objects were adjusted, very clearly appear from documents annexed to the special case and, in particular, from two telegrams of December 31, 1920, and January 7, 1921, which are specially important because, as will be seen, their terms became binding contractually upon the Association after it was formed.

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Summarized, these documents show that it was, in the view of the Commonwealth Government, of vital importance not only to the wool industry, but to the Commonwealth generally that the realization of the surplus wool should not be conducted so as to destroy the market for the current clips. This was recognized by the Imperial Government. For Great Britain, however, it was essential, as Ministers expressed it in their telegram of December 31, 1920, that in view of the depressed condition of the textile industry involving much unemployment the operations of realization should be conducted with due regard to the legitimate interests of the British consumer. The realization also must be made as promptly as market conditions permitted, and it must be stipulated that His Majesty's Government may revoke the agency agreement at any time if the conduct of the business of the Association gives cause for dissatisfaction.

With this, in turn, the Commonwealth Government agreed. The policy favoured in Australia, it was explained in the cable of January 7, 1921, was "to dispose of the surplus or carry-over wool as promptly as market conditions permitted, and the sooner the better. As long as the surplus or carry-over wool remained in a raw condition it was a positive menace to Australian wool-growing."

In the result agreement was reached in terms thus summarized by the Prime Minister of the Commonwealth in the cable of January 7, 1921: "Having accepted the stipulations contained in your telegram [of December 31, 1920] it is hereby mutually agreed to liquidate the Australian section of the Imperial wool-purchase account at the earliest possible date and to hand over half of the surplus assets ascertained and certified to exist on the agreed settling day to Commonwealth Government, which will, in turn, hand it over to the Realization Association on account of Australian wool-growers in final settlement of the reciprocal obligations under the three wool purchase contracts. It is further agreed that subject to an agreement being arrived at between Minister of Munitions and Sir John Higgins, chairman of the special executive committee appointed by representatives of the

Australian wool industry with my concurrence, His Majesty's Government assents to the formation of the British Australian Wool Realization Association, Limited. It is also agreed that His Majesty's Government shall sell through the agency of the proposed Association their half of the Australian carry-over wool subject to the before mentioned qualification. Your reference to an arrangement which you hope will shortly be made whereby the New Zealand carry-over wool will be at the disposal of the Association is noted with great interest by Commonwealth Government. It is hardly necessary for me to emphasise the importance of this. I trust that the arrangement may be concluded without delay."

The Association—the British Australian Wool Realization Association, Ld.—its primary and in the result its only purpose, is reflected even in its name—was incorporated in Victoria on January 27, 1921, with a nominal capital of 25,000,000*l.*, in shares of 1*l.* each. Its constitution was the result, as has been seen, of direct agreement between the two Governments. There was, indeed, no one else to agree anything in relation to it. Except for the five subscribers to its memorandum of association, all of them members of the Australian board appointed by the articles and subscribing for one share each, the Association had no shareholders for some months, and these were admitted, as will presently appear, only by the direction of the Commonwealth Government itself. Its memorandum and articles of association, while in many respects in common form, are conveniently effective for every purpose then in view. In its memorandum of association reference is specifically made to its primary object, and by article 62, which names the eleven first directors—five of them, the British board, with Sir Arthur Horne Goldfinch, director-general of raw materials at the Ministry of Munitions, at their head, and six of them, the Australian board, with Sir John M. Higgins, chairman of the Central Wool Committee, at their head, with no share or other qualification required from any one of them—the control of the Association on the lines arranged is obtained at the outset, while by the provision that these first directors shall hold office until 1924 that control, maintained during realization, continued undisturbed throughout the existence of the Association.

But the attainment of these governmental purposes as agreed was further assured contractually by the agreements with the two Governments, into which the Association entered some weeks after it had been registered. The first of these in logical order is dated April 1, 1921, and is made with the Government of the Commonwealth. It recites the agreement of that Government with the Imperial Government under which the former had become entitled to one half of the profits of the surplus Australian wool and declares that with the consent of the Imperial Government the Commonwealth Government assigns to the Association all its right title and interest under the agreement to the intent that the Association shall be entitled to the half share of the Commonwealth Government referred to so far as such share has not already been paid to that Government. The consideration for the transfer is expressed to be 12,000,000 shares and 10,000,000*l*. priority wool certificates of the Association, all fully paid up, to be issued to such companies, firms and persons as the Central Wool Committee for and on behalf of the Commonwealth Government may nominate, and there is a provision that these shares and certificates may be reduced in number by payments [in cash] to such companies, firms or persons in lieu of such shares and certificates.

The second agreement, first in point of date, was made with the Imperial Government on March 31, 1921. Its terms are summarized in para. 9 of the special case. It provided for the entire interest of the Imperial Government in the surplus wool being handed over to the Association for realization on the terms of its receiving a selling commission of 1 per cent. on the sale price. Clause 9 of the agreement is for present purposes very material: "It is agreed that no physical division of the Australian wool in which the [Association] has a one half interest shall be made except as provided expressly hereafter, but that one half of every bale of such wool shall become the property of the [Association] and the other half of every such bale shall remain the property of the [Imperial] Government to be held in trust by the [Association] in trust for the [Imperial] Government and that one half of the proceeds on every bale of such wool sold by the [Association] shall be accounted for to the [Imperial] Government and one half of the proceeds shall be retained by the [Association]."

The Association, by clause 13, undertook in the management and control of the sales of wool to abide by the conditions laid down in the telegrams, already referred to, of December 31, 1920, and January 7, 1921, while by clause 14 the power of revocation reserved to the Imperial Government by the former telegram is confirmed and agreed to and provision is made for a separation of the undivided interests of the Imperial Government and the Association in the surplus wool in the event of that power being exercised.

Finally by clause 20, it was agreed that if any of the first directors of the Association ceased to hold office while the selling agency of the Association was in operation, the Imperial Government should have the right of approval of all persons proposed to be appointed in their stead by the Association.

Under these agreements accordingly there passed to the Association the Commonwealth Government interest in the surplus wool still unrealized—an interest now formally recognized by the Imperial Government. There passed to it also a sum of 6,891,295*l.*, representing a moiety of the realizations already effected by that government and not, so far, paid over. Further, the Association under the agreements, became the instrument for the conversion of the whole of the surplus wool still unsold into cash, and so far as the Commonwealth moiety of that wool was concerned, it became also the medium for the distribution of the net surplus amongst those to be designated by that government as its recipients—namely, the original suppliers of wool.

To those who had supplied in large quantities there were issued by official direction and in proportion to the appraised value of the wool they had respectively provided, all the priority certificates and shares of the Association which in the event constituted the scrip consideration for the transfer. For those of the suppliers whose wool had not exceeded 100*l.* in appraised value—some 50,000 in number—a sum of 250,000*l.* was, under the like direction, set aside by the Association. Out of that sum there was made to each of them in accordance with the direction of the Central Wool Committee and in satisfaction of all his claims, a cash payment which, less a substantial discount, represented the equivalent in nominal value of the wool certificates or shares which under the formulated scheme of distribution would otherwise have been his, but which in the event were never issued at all.

If, in its realization of surplus wool, a moderate market price was in the interests of the Australian growers to be maintained, it was, doubtless, essential that the realization of the New Zealand wool should also be under the same official control. It is not surprising, therefore, that the decision of the Imperial Government to entrust this task also to the Association was so warmly welcomed by the Prime Minister of Australia in his cable of January 7, 1921. In this, as so frequently throughout the case, is it made apparent, that the realization by the Association was primarily always an affair of State, and never, in essence, commercial.

In the realization the Association was engaged for three years. It never essayed any other activity. The last bale of wool was sold at Hull in March, 1924. It paid no dividends. The net proceeds of realization as they became available were, as to one moiety, accounted for to the Imperial Government, its principal. As to the other moiety of the Australian wool, supplemented by the cash proceeds of earlier realizations, received under the contract of April 1, 1921, as above stated, these were applied, first, in the redemption of the priority wool certificates and next in paying off, under schemes of reduction sanctioned by the Court, the capital credited as paid on the shares of the Association. As a result of this procedure—a procedure which it will be seen was the nearest possible approximation, while the Association was still a going concern, to the normal distribution made by a company in liquidation—10*s*. per share were distributed in April, 1923, and 9*s*. per share in February, 1924. With 1*s*. still credited on each of its shares, the Association, its realization completed, went into voluntary liquidation on July 10, 1926, and in that liquidation the last remaining shilling has been paid off, leaving in the hands of the liquidators the balance of over 4,100,000*l*. This sum, after all expenses have been met thereout, will become available for distribution as surplus assets, amongst the contributories of the Association, that is to say, amongst the original allottee suppliers or their transferees in accordance with their proportionate rights and interests therein.

The Commissioner, treating the entire amount as profit earned and arising as to some part of it in every one of the five years 1921–1925 has, by assessments for each of these years, charged the Association with income tax in respect of one-fourth of the whole—such being the proportion fixed by himself without, it must be said, any obvious justification—as that earned in or derived in or from Victoria by the Association. The Supreme Court, as already stated, held this assessment to be invalid. The question now to be inquired into and decided—the first of the three already particularized—is whether it is good in whole or in part.

Before embarking on that inquiry it will be convenient to direct attention to an underlying question much discussed in argument—the question, namely, whether the fully paid scrip issued by the Association pursuant to the contract of April 1, 1921, represented a purchase consideration equivalent to its nominal value. It is only upon the assumption that it did, that the first head of assessment here can, in point of amount, be justified. Apart, however, from its importance on that head, some attention to this aspect of the case will not be misplaced by reason of the light it throws upon the true role played by the Association in this great transaction of State.

Now in the whole record nothing is more striking than the fact that neither for the purpose of fixing the purchase consideration and thus quantifying the extent of Government bounty to the suppliers nor with any other object was it ever attempted to ascertain the real value of the 1,836,005 bales of surplus wool still unrealized with which the Association had to deal. Doubtless the task was one beset with difficulty, but their Lordships cannot doubt that the reason why it was not even essayed was that its result, however reliable, would have served no useful purpose. With the small suppliers provided for by the sum of 250,000*l.* set aside to meet their claims there was nothing to be gained by a valuation made for the purpose of fixing the nominal value of the shares to be issued to the others. The amounts to be ultimately received in respect of these shares in no way resulted from their face value for the reason that, with an exception entirely negligible, the shares represented all the issued shares of the Association, and they were at all times in the hands of the suppliers to whom they were originally issued or of transferees or others deriving title under them. No further shares were ever issued to anybody. The original shares accordingly gave to their holders collectively all there was to be had. The nominal value attached to them, except for the purpose of fixing proportions in distribution, was of no account, and for that effective purpose one set of figures was just as good as another. The circular which accompanied the issue of the shares correctly stated the position. "The value of the shares," it said, "will depend absolutely on the market price of wool current during the realization period and no forecast can be mentioned at the pressent time as to the duration of such period."

13,957,105*l.*, the sum at which the interest of the Association in the surplus wool was in fact taken into its books, and at which that interest was reflected in the nominal purchase consideration, was reached as the result of a calculation described in the case—a calculation so remote from the realities that it could not have been supposed by any one to have supplied, except by accident, a conclusion of values even approximately reliable. From the beginning it was as a valuation discounted by all previous results of realization, while its inadequacy disclosed in the immediate experience of the Association itself, was by 1922, as is seen by the report of that year annexed to the special case, fully recognized. Yet there was no resulting change in the accounts, and in every year of the realization—four in all—the remaining stock was still brought in at the original figure notwithstanding the surpluses year by year resulting from the realization which was proceeding.

The explanation of all this, their Lordships think, lies in the constitution and working of the Association in which an arbitrary figure to represent its paid up capital was for every effective purpose just as good as any other. If it was convenient, it was preferable to one which, whatever else its merit, was less so. This view is strikingly confirmed by a transaction, the foundation of the third question raised by the appeal—which in that connection must later be particularized. Here it suffices to recall that it concerns the two sums of 68,848*l.* 7*s.* 9*d.* paid by the Commonwealth Government to the Association in the years 1923 and 1924, sums to which under the contract of April 1, 1921, the Association had no claim. There are several corners of the case illuminated by this transaction. It supplies, for instance, one of many indications that for the Commonwealth Government the Association, if it was not always so, certainly became essentially and beyond all else the medium for distribution of the promised bounty to the wool suppliers. For the moment, however, their Lordships point to the transaction as further confirming the conclusion already deduced from so many other converging circumstances that the nominal value of the shares issued under the contract of April 1, 1921, was at no time of any effective significance. Even so large an addition to the consideration as that just stated was not allowed to add anything to it. In other words the issue was not based on real values, because it never was necessary that it should be.

Their Lordships do not forget the suggestions in a contrary direction made on behalf of the Commissioner. More especially do they bear in mind the arguments based upon the settlement with the small suppliers where, apparently, the nominal value of the Association's issued shares determined the actual cash payments made. But the sum provided for the small suppliers collectively was itself arbitrary in amount. The participants were legion, and while presumably the individual payments made were not on the face of them inappropriate, their Lordships have little doubt that they were fixed by the Committee in the exercise of the power to do what seemed to be called for in the circumstances, a power which they rightly assumed government possessed. Accordingly, even this argument when weighed in the scales is found wanting, and it is their Lordships' considered conclusion on the predominant balance of fact that the figure above stated, while it was never a true index of value, was at no time so regarded. In this aspect of it this case finds its place among the authorities of which *Assets Co.* v. *Forbes* (1) and *Rand* v. *Alberni Land Co.* (2) may be cited as typical. So much for this question.

And there is another, upon which something must be said before their Lordships proceed further with their inquiry. In certain aspects of it, the description already given of the realization committed to the Association must be supplemented. Much depends upon a true conception being formed of that realization.

As must already have been gathered it was no new thing. Indeed, realization had been proceeding under a Committee of the Ministry of Munitions with Sir Arthur Goldfinch as its chairman since before the armistice—that is to say for over two years. During that time great quantities of wool had been disposed of to civilian purchasers. As much as 14½ million pounds sterling had already been or were ready to be paid over by the Imperial Government in respect of the Commonwealth's promised half-share of the result. And this figure, large as it is, furnishes no test of the real extent of the realization which produced it. For the Imperial Government treated no proceeds as available for division until its own disbursements in relation to all its surplus wool sold and unsold had been recouped. Accordingly, the proceeds of realization in addition to the surplus divided had sufficed also to reimburse the full price originally paid by Government for all the wool still unrealized. The 1,836,005 bales which on December 31, 1920, remained in specie had no charge for purchase price standing against them. That had all been met out of the earlier realizations. The quantity of wool so realized must therefore have been enormous. It may well have exceeded the quantity subsequently disposed of by the Association itself. And these earlier realizations were realizations of the entirety of the wool sold, and it was to such a realization that the Association succeeded. It is not proper to regard its work as having been no more than a realization of its own undivided moiety of surplus wool separated and disconnected from all else, although that is what the Commissioner in justification of this first assessment has striven to do. In real truth notwithstanding variations in the legal title to the second moiety, there was throughout only one realization of the surplus wool and that a realization of the entirety effected by two successive agencies—the Association being the latest—but all of it rendered necessary until completely accomplished, by the fact that the wool having become superfluous for the purpose for which it had originally been acquired and useless in the hands of its owners for any other purpose had either to be realized or wasted. This, their Lordships think, is the outstanding fact. There is in the case no indication that except in one respect the realizations by the Association differed in any way from those to which it succeeded. It is not to be supposed that they would. They continued under the management of the same people. The British board of the Association which conducted them was, even in its personnel, little more than a continuation of Sir Arthur Goldfinch's munitions committee. The organization had now a different name; it was constituted by a different legal authority, but in all essentials it remained as before. The true inference from all the facts stated and appearing is, as their Lordships cannot doubt, that Sir Arthur Goldfinch and his colleagues, continued as a board, the realization which as a Committee they had inaugurated. Between the actual machinery of realization in use by them as a Committee and that utilized by them as the board the case again draws no distinction. It must have seemed to the learned county court judge that there was none to be drawn. The clear impression produced and doubtless intended is that the Association and its British board inherited and utilized the selling organization of the Committee just as it was.

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(1) 3 Tax Cas. 542.

(2) 7 Tax Cas. 629.

In one respect only, as has already been seen, was there a change—one not externally visible, but of the essence—a change which served to convert the realizations of the Association into something quite sui generis so far as the authorities relating to such claims as the present are concerned. Under the Committee the disposal of the surplus wool had been a purely commercial operation, presenting, as has been seen up to 1920, no difficulty. Under the British board of the Association its realization and that of the New Zealand wool as well became a matter of arranged State policy. The agreement between the two governments, out of which the Association came into being, brought that about, and a realization of surplus wool whose sole or even primary purpose was the acquisition of gain, whether by the Imperial Government in respect of one moiety, or by the Association or its members in respect of the other was never again entertained. "Personal or individual gain is absent in the formation of the Association," was the assurance of the telegram of January 7, 1921. And it so remained.

The control, through the board appointed at the beginning by agreement between the governments continued unbroken. The precautions taken to prevent miscarriage in that matter, already detailed, did not fail of effect. From the first the shareholders in the Association accepted the passive rôle assigned to them, content, as indeed in the circumstances they well might be, to receive in their prescribed proportions as volunteers under government the proceeds accruing from a realization of the government share officially inspired and directed. In all these respects this case, so far as their Lordships' experience goes, stands alone.

Is then this assessment upon the Association in respect of the sum covered by the first question good in whole or in part ? To a consideration of that question, their Lordships now proceed. It is with reference to a company circumstanced as has just been detailed and with reference also to a realization so unprecedented alike in character and extent that the answer must be given, and their Lordships have reached the conclusion that the answer of the majority of the learned judges of the Supreme Court is the just one. The sums by the assessment brought into charge are not, they think, profits of the Association within the meaning of s. 35 of the Act of 1915, and greatly as do the exceptional circumstances of the case point to that conclusion as being alone possible it is not, their Lordships think, strictly necessary to rely upon them in order to reach it. The facts, as detailed in this judgment, cannot upon the authorities dealing with such questions properly lead to any other. The Association became possessed of its undivided moiety of each bale of surplus Australian wool, for valuable consideration, it must be agreed, but under a binding contract to realize the other moiety expressed in such terms that its performance involved of necessity the simultaneous realization of its own. Moreover, with regard to that moiety the Association was the instrument for the fulfilment of a promise made on behalf of the Commonwealth Government from whom the wool had come that the proceeds of the realization would pass to the shareholders of the Association when available. No doubt the Association had under its memorandum of association full power to treat the proceeds of realization as circulating capital to be embarked and traded with in any business thereby authorized. But the Association could not have exercised that power without breach of a promise made on its behalf when its shares were handed to their original recipients, and there is no suggestion that any authority within the Association ever attempted to do so. It follows if the language of economists may be employed that in truth and in fact the Association's interest in the wool always was fixed capital and never was circulating capital. Its purpose with reference to it was to realize the asset, having done so to distribute the proceeds among those entitled and then itself to disappear. And this is just what in fact it did, and so effectively that if the Association had gone into liquidation so soon as the realization commenced instead of doing so after it was completed, the distribution of the proceeds amongst the contributories could not have been speedier than was the distribution amongst the shareholders.

To their Lordships, therefore, there is disclosed, on their view of the facts here, a case entirely within the terms of the following words from the judgment in *Californian Copper Syndicate* v. *Harris* (1), which have since been so often cited with approval: "It is quite a well settled principle in dealing with questions of assessment of income tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit . . . . assessable to income tax." Equally applicable, in the view of their Lordships, are the words of Lord Dunedin in *Commissioner of Taxes* v. *Melbourne Trust* (2), where he says: "If the liquidator of one of the banks had made an estimate of the various assets held by him for realization, and then on realization had obtained more than that estimate, such surplus would not have been profit assessable to income tax."

These pronouncements primarily made with reference to the British Income Tax Act are, in view of its judicial interpretation, equally applicable to s. 35 of the Victorian statute. And they are, as it seems to their Lordships, sufficient to conclude this part of the case unless their effect can be displaced by either of two qualifying considerations to which attention was directed in the course of the arguments.

The first of these was that while the conclusion might have been inevitable had the realization been one by an individual of his own property, different considerations apply when the realization is that of a company's property by the company itself. This distinction is not infrequently drawn in cases upon the subject. Notable instances will be found in the

(1) (1904) 5 Tax Cas. 159, 165.

(2) [1914] A. C. 1001, 1009.

judgment of Rowlatt J. in *Rand* v. *Alberni Land Co.* (1) and of Warrington L.J. in *Inland Revenue Commissioners* v. *Westleigh Estates Co.* (2) The distinction, where it exists, arises of course from the fact that whereas the capacities of a natural person have no limitation so that any particular transaction need not be referred to any of them, a company is so bounded by its memorandum that it may be both permissible and essential to consider its authorized objects in connection with the actual transaction in question and even to seek for the principal purpose of its formation. But there is, in their Lordships' judgment, no room in the present case for the distinction referred to not only because the business of realization, as might be suspected from its very name, is, as has been said, one of the expressed purposes of the Association, but because the realization of this particular asset was a burden imposed upon it by contract, while the distribution of the proceeds resulted from a promise made on its behalf by the Commonwealth Government. If the Association had in either respect acted otherwise than it did it would have failed to fulfil the full purpose which by agreement between the two governments it was formed to achieve.

And the second qualifying consideration flowed from the suggestion that there must have been set up by the Association in connection with this realization a selling organization so extensive that it became a business from which this surplus fund now in question resulted as a trading profit. Reverting to the *Californian Copper Syndicate's* case (3), the fund, it is suggested, is not the result of such a realization as that envisaged in the passage from the judgment already quoted, but is an "enhanced value" within the meaning of this statement which immediately follows: "But it is equally well established that enhanced values obtained from realization or conversions may be so assessable" (i.e., to income tax) "where what is done is not merely a realization or change of investment but an act done in what is truly the carrying out or carrying on of a business"—an aspect of the matter well described by Rowlatt J. in his judgment in the case of *Alabama Coal, etc., Co.* v. *Mylam* (1) where, dealing with a finding there of the special commissioners he says: "Merely realizing is not trading. It is no good saying it is a trade of realizing. But, I think, what they mean is: they have taken a process of realizing and embedded it in a trade so that in the course of carrying on a trade they have in fact done some realizing."

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(1) 7 Tax Cas. 629, 639.

(2) [1924] 1 K. B. 390, 417.

(3) (1904) 5 Tax Cas. 159, 165.

Now can it be said that the operations of the Association are aptly described in either of these judicial utterances? Their Lordships recognize that it is here that the case of the Association on this first head of claim is most vulnerable, and it is in order that its true position in this connection may not be missed that they have been at pains to emphasize the absence or omission from the special case of any reference, as a relevant factor, to the existence of any trade of the Association in which this realization could be "embedded," and to point to the irresistible inference from the statements in the case that the Association neither invented nor organized any selling organization of its own but merely accepted the machinery it found at hand. All that its British board did was to utilize on its behalf the organization under which they had acted when, as a committee of the Ministry of Munitions, they were engaged in the same task of realization. In other words, in their Lordships' judgment there is in the special case neither a finding, nor any statement of facts warranting the conclusion that this Association ever indulged in any activity except that of realization which, as Rowlatt J. has said, "is not a trade." Upon the facts stated, any other conclusion would be tantamount to saying that a realization such as that effected by the Association must be a trade because of the bringing into existence of a selling organization made necessary only by reason of the mere magnitude of the realization—a proposition not to be entertained. It is interesting on this part of the case to contrast the findings and the facts in the case of *Martin* v. *Lowry* (2) with those detailed in this judgment. It is hardly surprising that at their Lordships' Bar, the appellant, notwithstanding the actual decision there and some encouragement from the judgment of Macfarlan J. here found little in that case to assist him.

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(1) 11 Tax Cas. 232, 252.
(2) [1926] 1 K. B. 550; [1927] A. C. 312.

The contentions raised by the appellant on this first head of claim did not controvert their Lordships' conclusions for the reason that they were conditioned by a view of the facts which the Board is quite unable to accept. They consisted, in the main, in a justification of the judgment of Macfarlan J. who, in the Supreme Court, as has been already stated, alone agreed with the Commissioner that this assessment represented under the Victorian statute a taxable profit. The inferences which that learned judge drew from the facts as stated in the special case appear from his judgment to have been, first, that the Association was formed by reason of the desire of those interested in the remaining surplus wool to entrust its realization to an organization which would carry on the undertaking of a wool-selling company on business lines; and secondly, that if the Association was in any sense "machinery" for distribution of the Commonwealth share the machinery chosen was that of a profit earning organization with which those interested in the realization decided to make a fresh start. It was from the trading operations of that organization that the profit in question resulted. These conclusions of the learned judge were so expressed as to justify the surmise that the facts of the case as he saw them brought it within the principle of *Martin* v. *Lowry* (1) and within the actual decision in *Commissioner of Taxes* v. *Melbourne Trust.* (2) Their Lordships do not suppose that on the facts as these have been interpreted in this judgment, the learned judge would have considered either the principle of the one case or the decision in the other to be of any relevance. The truth is that here the true conclusion flows from the view taken of the facts, and the contentions of the Commissioner, as well as the decision on this point of the learned judge, were based upon a reading of these which their Lordships cannot accept.

But while their Lordships have elaborately examined the facts of the case, and in deference to the able arguments addressed to them, have dealt at length with the above aspect of it, they might have been well content to dispose of this first head of appeal on the ground chosen by Macfarlan J. for his decision—namely, that even if this fund was a taxable profit of the Association in the sense of s. 35 of the Act it was not brought into charge by reason of the fact that no part of it was earned in or derived in or from Victoria. As this answer applies also to the second head of appeal—namely, that for income tax upon the sums received by way of commission on realization by the Association of the wool belonging to the Imperial Government, the two claims may in what follows be considered together.

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(1) [1926] 1 K. B. 550; [1927] A. C. 312.

(2) [1914] A. C. 1001.

Now the facts with reference to this aspect of the case appear to be that no wool at all was sold by the Association in Australia. It was the British board operating outside Victoria that regulated the quantities of wool to be marketed from time to time and entered into all contracts and made all deliveries. Every payment for wool sold was made out of Australia. Such wool as was stored in Australia at the beginning was from time to time exported upon explicit directions as to quantity and quality from the British board, and was insured by that board in transit. All the Australian wool had been acquired by the Imperial Government and paid for by that Government prior to the registration of the Association. The Association was incorporated in Victoria and its registered office was situate in Melbourne, probably because of the fact that Melbourne was the seat of the Central Wool Committee and also of the Commonwealth Government. Certain, in any case, it is that although the fact that the Australian board of this Victorian Association, presided over by the chairman of the Association, held its meetings at Melbourne was the main ground for the Commissioner's contention that some part, at all events, of the profits of the Association must be taken to have been earned in or derived in or from Victoria, he was unable to point to any action of that board that could not just as conveniently have been carried out in any other State; nor to any operation of realization for which the Australian board was really

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responsible. The activities of that board mentioned in paras. 35 et seq. of the special case do not seem to their Lordships to help in this connection, and it is their view on the facts stated that no part of the profit-earning operations of the Association were carried out in Victoria, and no part of its so-called profits were earned in or derived in or from Victoria. And this their Lordships think was the view of all the judges of the Supreme Court.

This branch of the case, in the view of the Board, is really covered by the decisions in *Grainger* v. *Gough* (1) and *Lovell & Christmas, Ld.* v. *Commissioner of Taxes.* (2) They recall the words used in the latter case: "One rule is easily deducible from the decided cases. The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income Tax Acts, so as to render the profits liable to income tax."

It is not without interest to note in this connection that in the *Melbourne Trust* case (3), of which so much was sought to be made in argument, the only surpluses on realization upon which Victorian tax was either claimed or allowed were the sum of 104,782*l.* 1*s.* 4*d.* realized from assets actually situate in Victoria, and 509*l.* 1*s.*, representing the difference between prices paid and par for the Company's debenture stock there.

In regard, therefore, both to the first and the second heads of claim, their Lordships are in agreement with the Supreme Court.

The third head already referred to remains to be disposed of. The facts with reference to it are set forth in a supplemental case and so far as material are that on March 12, 1924—that is to say, before the incorporation of the Association—the Commonwealth Government allowed the Wool

(1) [1896] A. C. 325.
(2) [1908] A. C. 46, 51.
(3) [1914] A. C. 1001.

Combing and Spinning Co., Ld., to select for the purposes of its business and at the flat rate acquisition price certain wools acquired for the Imperial Government under the scheme of purchase already described. By the agreement the Spinning Co. agreed to account to the Government over and above the flat rate price for a proportion of the profit made by it from its manipulation of the purchased wool. On April 16, 1920, in answer to a question in the Commonwealth Parliament, the Prime Minister stated that the Government would allow this profit when received to go to the wool-growers, as if the wool had been part of that sold to the Imperial Government. But the profit formed no part of the assets included in the Government's contract of April 1, 1921, nor was it treated as any part of the assets then taken over by the Association. Nevertheless, when the amount of the profit had been adjusted and ascertained, and was found to be represented by the two sums already referred to, it was to the Association that these were paid by Government with the result that these came to be distributed with the proceeds of realization amongst the original shareholders of the Association or the transferees of their shares exclusively of all other persons. In other words, the Association in respect of these sums truly became the medium for their distribution amongst those designated by Government to receive them. In no sense were they profits " earned " by the Association, and even more clearly, if that be possible, were they not earned by it " in or derived in or from Victoria." The appeal, therefore, with regard to this sum also fails.

Further objections taken by the Association to the assessments, all minor in character, need not be discussed or further referred to in view of the favourable conclusion reached by the Board on its main contentions.

As a last resort the Commissioner sought to justify his assessment by reference to the amendment following made to the principal Income Tax Act, 1915, by the Income Tax Acts Amendment Act, 1923 : " 7. (1.) The proceeds derived from the sale after the 13th day of June, 1922, whether on the sale of a business as a going concern or in any other manner whatsoever, of the trading stock or part of the trading stock of any business shall be assessable income derived from carrying on a business: " and in s. 5 of the same Act a comprehensive definition of "trading stock" is given.

This section was in no way referred to by the Commissioner in the Court below and counsel for the Association objected to its being introduced into the discussion now. The objection their Lordships think was well taken. It is only under exceptional circumstances that the Board allows to be raised before it a new issue of this kind upon which it has not the benefit or assistance of the views of the learned judges who have dealt with the case. And these exceptional circumstances do not exist here. Their Lordships accordingly do not propose to deal with the section in any way. But they must not, in saying so much, be supposed to imply that, if the section were examined, it would be found to assist the appellant.

Upon a consideration of the whole case their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellant: *Freshfields, Leese & Munns.*

Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

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COMMISSIONER OF TAXES . . . . APPELLANT;

AND

UNION TRUSTEE COMPANY OF AUSTRALIA, LIMITED . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Australia (Queensland)—Income Tax—Source of Income outside Queensland—Payments by Wool Realization Association—Territorial Limitation of Taxation—Construction of Act—Income Tax Act, 1924–1926 (*Queensland*; 15 *Geo.* 5, *No.* 34—17 *Geo.* 5, *No.* 32), *s.* 10, *sub-s.* 2 (*ii.*) (*b*).

As the general scheme of the Queensland Income Tax Act of 1924 bases liability to tax thereunder upon the source of the income, not the residence of the taxpayer, being in Queensland, and as the power of a legislature to tax property (whether real or personal) is limited territorially, s. 10, sub-s. 2, of the Act, which purports to tax profits arising from the sale of "any personal property whatsoever," applies only to personal property in Queensland; so, too, para. (ii.) (*b*), which was added to s. 10, sub-s. 2, by an amending Act of 1926, and purports to tax money received from a company in respect of shares issued in circumstances stated in para. (ii.) (*a*), cannot be construed as referring to a company which does not carry on business, or possess assets, or derive its profits from a source in Queensland.

Consequently, a wool grower resident in Queensland is not liable to income tax under s. 10, sub-s. 2, of the above Act in respect of sums received by him as a shareholder in the British Australian Wool Realization Association, Ld. Further, the excess of the sums so received over the market value of the shares when issued cannot be treated as an addition to the profits of the shareholder's business, because income tax having been paid by him upon the shares when issued they became property with its own incidence, if any, to tax.

Blackwood v. *The Queen* (1882) 8 App. Cas. 82 applied.

Judgment of the Supreme Court of Queensland affirmed.

APPEAL (No. 78 of 1929) from a judgment of the Full Court of the Supreme Court of Queensland (October 12, 1928) reversing a judgment of Macnaughton J., who had stated a special case for the opinion of the Full Court.

The substantial question arising was whether a wool grower resident and domiciled in Queensland was liable to income

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* *Present:* LORD SANKEY L.C., LORD BLANESBURGH, LORD MERRIVALE, LORD HANWORTH M.R., and LORD RUSSELL OF KILLOWEN.

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tax under the Income Tax Act of 1924, of that State, or under that Act as amended by the Income Tax Amendment Act of 1926, upon 3504*l*., being the amount by which two sums received by him in respect of 10,781 shares in the British Australian Wool Realization Association, Ld., exceeded the market value of the shares on July 30, 1921, when they were issued to him, upon which value he had already paid income tax. The shareholder having died was represented by the respondents, his executors.

The facts and the relevant provisions of the above Acts appear from the judgment of the Judicial Committee.

The Full Court (Blair C.J., Macrossan S.P.J., Webb and Woolcock JJ.; Douglas J. dissenting) held that the sums in question were not subject to income tax. The grounds of the judgment of Macrossan S.P.J., with which the majority agreed, and of Douglas J. appear from the present judgment. The proceedings are fully reported at 1929, St. R. Qd. 145.

1930. April 7, 8, 10. *Sir Boyd Merriman K.C.* and *R. P. Hills* for the appellant.

W. A. Greene K.C. and *J. H. Stamp* for the respondents.

The arguments were chiefly upon the construction of the statutory provisions referred to in the present judgment. Reference was made to *Hughes* v. *Munro* (1); *Nathan* v. *Federal Commissioner of Taxation* (2); *Federal Commissioner of Taxation* v. *Munro* (3); *Commissioners of Stamps (Qd.)* v. *Wienholt* (4); *McLeod* v. *Attorney-General for N. S. W.* (5); *Blackwood* v. *The Queen* (6); and s. 122 of the Queensland Constitution Act, 1867.

Nov. 17. The judgment of their Lordships was delivered by

LORD BLANESBURGH. This appeal arises out of an assessment to income tax under the Queensland Income Tax Acts, 1924 to 1926, upon one Arthur Herbert Whittingham for the

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(1) (1909) 9 C. L. R. 289.
(2) (1918) 25 C. L. R. 183.
(3) (1926) 38 C. L. R. 153, 180.
(4) (1915) 20 C. L. R. 531.
(5) [1891] A. C. 455.
(6) 8 App. Cas. 82.

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income tax year ending June 30, 1924. Mr. Whittingham has died in the course of these proceedings. The respondent company is the executor of his will.

The testator—it will be convenient so to refer to him—on April 15, 1925, duly made his income tax return for the year in question and notice of the assessment was served upon him on May 26 following. The assessment was made under the Income Tax Act of 1924 only. Objections to it were duly lodged by the testator on June 4, 1925, and these were followed by an amended assessment, notice of which was served on November 3, 1925. On November 29, 1926—that is to say more than a year later—the Income Tax Amendment Act of 1926, received the Royal assent, and on the same day the Commissioner disallowed the testator's objections and duly notified his decision. The Commissioner while still maintaining his contention that the assessment was justified under the Act of 1924, has been mainly concerned to support his action by reference to the amendment Act of 1926, the relevant provisions of which are thereby made retrospective. In due course the testator requested that his objections, treated as an appeal, should be forwarded for determination to a Court of Review. On June 3, 1927, Macnaughton J. sitting as such a Court without however assigning any reasons therefor, gave judgment overruling the testator's objections, formally confirmed the assessment and dismissed the appeal. The learned judge purposely refrained from expressing any opinion of his own upon the questions submitted to him. His object, and he attained it, was through the medium of a special case stated by himself, to have the whole matter referred to the Full Court.

The case came first before that Court in the presence of three learned judges, and after a prolonged debate was adjourned that it might be heard by a Court of five. The Court as reconstituted gave judgment on October 12, 1928. They allowed the appeal with one dissentient, Douglas J., declaring the assessment upon the testator to have been invalid. And they ordered the special case to be remitted to the Court of Review for the necessary action to be taken in accordance with their opinion. This is an appeal by the Commissioner from that order.

The assessment upon the testator was made in respect of certain moneys received by him from a Victorian company called the British Australian Wool Realization Association, Ld., in respect of 10,781 shares in the Association registered in his name. The testator was a Queensland sheep grazier and wool grower. He first became possessed of the shares in question as the final result, so far as he was concerned, of the scheme first arranged between the Commonwealth Government and the Imperial Government in the year 1916, whereby the latter Government, for the supply of the Allied forces and other requirements of the war, secured the whole of the wool clip of Australia during the wool years 1916–17 to 1919–20. The testator between November, 1916, and July, 1920, had, under that scheme, disposed of his clips to Government and had received therefor the appraised prices provided by the Imperial Government in that behalf. The shares in the Association allotted to him in 1921 represented his allocated proportion of the Commonwealth Government share of the profit realized by the sale of so much of the surplus wool as remained after the requirements of the British and Allied forces had been satisfied. Their Lordships, in their judgment just delivered in the case of the *Commissioner of Taxes* v. *British Australian Wool Realization Association, Ld.* (1), have traced in outline the history of that great scheme—the circumstances in which the Association was formed and the nature of its activities while it remained in active existence. The incidents in the history so far as they relate to the questions now at issue are detailed again in the special case. It will, accordingly, not be necessary that more should in this judgment be done than to summarize in relation to the Association and the issue of its shares, those salient facts and conclusions which have a bearing upon the present claim to Queensland income tax in respect of the testator's shares therein.

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(1) Supra, p. 224.

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The Association was in the year 1921 registered in the State of Victoria under the provisions of the Victorian Companies Act, 1915, as a company limited by shares. Its registered office has always been at Melbourne. Its share register has at all times been kept there. Its main purpose was to realize the whole of the surplus wool already referred to—as to one-half of it under transfer from the Commonwealth Government, as to the other half as agent for the Imperial Government. The payments made by the Association to the testator as holder of 10,781 of its issued shares represent, broadly, the proportion attributable to these shares of the distributed proceeds of realization of wool which had become the property of the Association, and for which proceeds it was not accountable to the Imperial Government. No part of any surplus wool which the Association realized by sale had, in its hands, in any true sense an Australian source. The place where the wool was originally grown had become an accident. The entire property in it had passed by sale from the different wool-growers to the Imperial Government, and the agreed price had been paid in full to them. It was from that Government, mediately or immediately, that the title of the Association to all the wool it sold was derived. About 101,619 bales were, it is true, on January 1, 1921, in store in Queensland on account of the Imperial Government, but during that year the whole of the stored wool was shipped to countries outside Australia. No wool was sold by the Association in Queensland. With the exception of a few bales —quite negligible in number—none was sold even in Australia. All contracts for sale were made outside Australia; no part of any of them was carried out in Queensland. Beyond allowing some of the wool stored there to remain where it was for a time before shipping it out of Australia, and beyond selling some storage sheds situated in Queensland, no part of its business of realization was conducted by the Association in that State. And the Association had no other business. With or even without the application of the rule de minimis, it is, in their Lordships' judgment, true to say, upon the facts stated, that no moneys at any time distributed by the

Association amongst its shareholders had any source in Queensland. Indeed, their Lordships did not understand the appellant seriously to dispute this conclusion, which seems very apparent. But the fact, it will be seen, when so found, is of almost decisive importance here.

The testator had no legal claim upon the Commonwealth Government for all or any of the 10,781 of the shares in the Association, which by its direction were allotted to him. These shares, in point of law, were in the nature of a gift from the Commonwealth Government to the testator. They were none the less so, because, at the time it was made, the gift was one which, for political reasons, that Government might have found it difficult, in some form, to withhold. Whether rightly or not, however, these shares were for Queensland income tax purposes treated as part of the testator's income for the year 1921 in which they were received. They were brought into account at their then market value of 12*s.* 6*d.* per share, and on that footing Queensland income tax was duly paid upon them by the testator. And that, in the testator's view, should have been the end. But it was not so to be.

The present proceedings result from two distributions of capital since made by the Association to its shareholders. The first was made in April, 1923, pursuant to a special resolution for reduction passed by the Association on July 20, 1922, and sanctioned by an order of the Supreme Court of Victoria dated October 19 in the same year. The second was made in February, 1924, pursuant to a like special resolution passed by the Association on May 17, 1923, and sanctioned in like manner on October 12, 1923. The first distribution consisted of 10*s.*, and the second of 9*s.* per share. No assessment to tax is sought to be made upon the testator in respect of the first of these distributions, nor in respect of 2*s.* 6*d.* per share of the second distribution, these amounts—in the aggregate one of 12*s.* 6*d.* per share—being regarded as covered by the tax paid in respect of the market value of the shares at the date of issue. But the balance of 6*s.* 6*d.* per share was ultimately treated by the Commissioner as taxable by virtue of the extensions of the Income Tax Act of 1924 effected by the Amendment Act of 1926, and alternatively by virtue of the Act of 1924 alone. This is the assessment to which the objection taken by the testator has been upheld by the Supreme Court.

Now, it is, their Lordships think, clear, and, indeed, that view was hardly contested by the appellant, that the scheme of the Queensland Income Tax Act of 1924 was to subject to income tax in Queensland only such "income" as is derived directly or indirectly from a source locally situate in Queensland. Accordingly, the principal issues raised on the appeal have been (1.) Whether the amending Act of 1926 must on its true construction be taken to have extended the operation of the 1924 Act to receipts from shares of a Victorian Company when none of these receipts, even so far as that Company was concerned, were derived from a Queensland source; and (2.) whether, if so, such an extension was within the power of the Queensland Legislature. The appellant, however, separately contended that, on the facts, the sums sought to be taxed were really profits of the testator's Queensland business being, in effect, an addition to the appraised price at which he had sold his wool to Government, so that the receipts were taxable as truly income from a Queensland source. It was on this ground that Douglas J., the dissentient judge in the Supreme Court, upheld the present assessment.

In the Supreme Court, Macrossan J., who delivered the leading judgment, expressed his opinion to be that under the Act of 1924 the personal residence of the taxpayer in Queensland was "irrelevant as a test of liability and that the local situation of the source of the income is a condition precedent to liability unless some express exception is clearly shown."

This conclusion of the learned judge appears to their Lordships to be amply warranted by the sections of the statute which he cited in support of it. For this purpose, and without quoting them at length, their Lordships would

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themselves refer to the definitions of "absentee," "income from personal exertion," and "income from the produce of property," in s. 4: to s. 7, the charging section, ss. 16, 19, 20, 30, providing for the returns to be made by the taxpayer, and to s. 50 of the Act. These sections lead them to the same conclusion as that reached by the learned judge. The Legislature in the Act is exercising its general power "to make laws for the peace, welfare and good government of the Colony in all cases whatsoever," and the frame of the Act indicates, their Lordships agree, that the fact on which territorial jurisdiction is founded is not the personal residence of the taxpayer in Queensland but the local situation of the source of income.

Nor is s. 10 of the Act different in its effect or intention, although its provisions are not like the others in express terms restricted to a "Queensland source." As this section is the basis of the extensions introduced by the Act of 1926, it may be convenient to set out its introductory provisions. They are as follows: "10. Without limiting the force or effect of any other provision of this Act assessable income shall expressly include as income from personal exertion—

(1.) All net gains or profits from the sale of any real property . . . .

(2.) All net gains or profits arising from the sale of any personal property whatsoever . . . . whether or not arising from any business carried on by the taxpayer; . . . ."

Now it must be agreed that these words are comprehensive. It is, however, not questioned that they must be subjected to some limitation. It is, it has to be conceded, almost ex necessitate rei that notwithstanding the absence of any limitation in the terms employed, the real property referred to in sub-s. 1 must be confined to such property locally situated within the State. And when the observation of Lord Hobhouse, in *Blackwood* v. *The Queen* (1), in dealing with a Victorian probate statute, is remembered, the necessity of restricting the generality of the section in its application to personal property is hardly less compelling. "It is said,"

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(1) 8 App. Cas. 82.

Lord Hobhouse observes in the case cited, "that the expression 'real estate' carries its own limitation with it, because it is something inconceivable—almost a violation of the law of nations—that a State should tax its subjects on the basis of their foreign real estate. But in fact personalty in England is as far beyond the direct power of the Victorian Legislature as realty in England."

Accordingly their Lordships cannot doubt that the opinion of Starke J. in *Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax* (1) dealing with its precursor is applicable also to this section—"It is confined to personal property situate in Queensland."

It might have been necessary to say something about the provisions numbered respectively (i) and (ii) of sub-s. 2 of s. 10 had these provisions not been repealed by the Act of 1926, other provisions by that Act being inserted in their place. It is upon these new paragraphs that the argument has mainly turned and to them it is necessary to refer with some care.

The first of them numbered (i) (*a*) deals with a case where a person has purchased or acquired shares in a company "being a Queensland company or a company carrying on business in Queensland" and proceeds to tax liquidation dividends in respect of such shares, providing by para. (*c*) that in the application of the sub-section to a "company which, not being a Queensland company, carries on business in Queensland" the amount of any liquidation dividend taxable "shall bear the same proportion to the full amount of the dividend received as the amount of the assets in Queensland of such company bore to its total assets at the commencement of the liquidation."

The second of the substituted provisions is that more directly in point now. So far as its terms are immediately material they are as follows: "(ii) (*a*) When any person at any time, on or after the 1st day of July 1921, having sold or disposed of or delivered for appraisement or any other purpose or supplied or having made or entered into any dealing or transaction with respect to goods produced in Queensland, afterwards has received or receives, whether in consideration of or in consequence of or otherwise directly or indirectly in relation to such sale, disposal, delivery, supply, dealing, or transaction or pursuant to any scheme being carried into effect or to be carried into effect by a company (wheresoever incorporated) certificates issued by or shares in such company, the value of such certificates or shares on the date on which they were or are so received by such person shall be treated as income of that person, but not arising from a sale . . . .

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(1) (1923) 33 C. L. R. 76, 114.

"(*b*) If such person has received or receives from the company . . . . any moneys in respect of or in any wise in relation to such certificates or shares, the following provisions shall be applicable: . . . ."—and then follow the conditions on which the "moneys" referred to are to be "income" of the taxpayer, for the purposes of taxation.

These are the provisions upon which the Commissioner here relies. Upon them the question at once arises: Is the Association such a company as is in provision (ii) referred to and are any "moneys" received from it by the testator liable to tax?

It would be affectation to doubt that the Association was directly in the view of the draftsman of these new provisions and it is not less probable that the testator's shares therein and the sums received by him in respect thereof were just the kind of receipts which the draftsman was intent to capture for taxation if he could. But the intentions or desires of a draftsman are of no importance in such matters. The question is whether the Legislature has accepted and made itself responsible for words which have that effect. It remains true of these provisions incorporated as they are into the Act of 1924 "that the local situation of the source is still a condition precedent to liability unless some express exception is clearly shown." Is that exception sufficiently apparent here?

Put in a concrete form the question is whether in provision (ii) (*b*) after the word "company" a Court of construction can imply such words as "whether carrying on business or possessed of assets or deriving its profits from sources in Queensland or not"; words of necessary implication if the provision as it stands is to have the effect contended for by the appellant.

In provision (ii) (*a*) in view of its subject-matter such words might be implied without damage to the structure of the Act: but in provision (ii) (*b*) their presence must destroy that structure entirely. Are the words then to be implied? The answer, their Lordships think, must be, no. It is true that the company referred to may be a company "wheresoever incorporated." But these words add nothing to the defined meaning of the word "company" in s. 4 of the principal Act: and it is significant, as it seems to the Board, that while the place of its incorporation is left expressly at large, no words are inserted in the provision to extend the area of the source from which the company's taxable receipts may be derived. It is significant, too (and the omission can judicially, their Lordships think, be best accounted for by the fact that the company referred to in the provision must be in every respect except registration, a Queensland company), that you find in this sub-clause no such limitation on the taxable fund as is expressed in provision (i) (*c*). In the result, in their Lordships' judgment, provision (ii) (*b*) is not so framed as to bring within its scope such a company as the Association has been shown to be and the assessment upon the testator cannot be justified by reference to it. If the Queensland Legislature essay without ambiguity of phrase to include such a company as the Association within the ambit of the enactment a very serious question as to its validity must arise. But that question, in their Lordships' view of the provision in its present form, does not yet call for decision.

It was, however, contended by the appellant that even so, the assessment upon the testator might be justified under the Act of 1924 alone upon the view that the sums received by him upon the successive reductions of capital in the Association in excess of the market value of his shares at the time they were received by him were profits of his business as a sheep breeder and wool grower. With reference to this contention their Lordships are willing to assume without

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deciding that the shares when received by the testator might have been regarded as a further price for the wool which he disposed of to Government and be taxed accordingly as they were. But so soon as income tax assessed upon the shares at their then value had been paid, these shares ceased in the testator's hands to be other than a form of property with its own incidence to income tax, if any there was attached to it. It is conceded that had the testator sold the shares, such would have been their position in the hands of a purchaser. Again, had he with the proceeds bought other shares in the Association such would have been the position of these shares in his hands. So with the shares in question. The further sums received by the testator in respect of them are no more a profit of his business than, if the total of the sums received had been less than their originally assessed value, would the difference have constituted a loss of such business.

In the judgment of the Board this contention also fails.

On the whole case their Lordships are of opinion that the order of the Supreme Court of October 12, 1928, was right, and they will humbly advise His Majesty that this appeal therefrom be dismissed with costs.

Solicitors for appellant: *Freshfields, Leese & Munns.*

Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

J. C.*
1930
Dec. 18.

STEEL COMPANY OF CANADA, LIMITED, AND OTHERS . . . . . } APPELLANTS;

AND

THOMAS RAMSAY AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO.

Canada—Company—Dividends—Rights of Preference and Ordinary Shareholders—Participating Rights—Construction of Letters Patent.

The letters patent of a company incorporated in 1910 under the Companies Act of Canada provided that the net profits from time to time distributed should be applicable first to paying a fixed cumulative dividend at the rate of 7 per cent. per annum on the preference shares, and that the holders of those shares should participate rateably with the holders of the ordinary shares in the distribution of net profits after the holders of the ordinary shares should have received "dividends equal to those paid on the preferred shares." Further, that no dividends should be paid on the ordinary shares until after the company had to the credit of a reserve fund a sum equal to one year's dividend on the issued preference shares:—

Held, that the preference shareholders were not entitled to receive in dividend more than 7 per cent. per annum until the ordinary shares should have received dividends which gave them that percentage on their shares since the incorporation of the company.

Judgment of the Supreme Court of Ontario, 65 Ont L.R 250 affirmed.

APPEAL (No. 103 of 1930) from a judgment of the Appellate Division of the Supreme Court of Ontario (March 17, 1930) affirming a judgment of Orde J. (August 23, 1929).

The appellant company, originally named the Canadian Steel Corporation, Ld., was incorporated in 1910 by letters patent under the Companies Act of Canada (R. S. Can., 1906, c. 79).

On December 28, 1928, the respondents, suing on behalf of themselves and all other holders of ordinary shares in the company, brought an action against the company and two named defendants, sued on behalf of themselves and all other holders of preference shares, to restrain the company from paying any dividends on the preference shares in excess of 7 per cent. per annum until the total dividends paid on the ordinary shares since the incorporation of the company equalled dividends at that rate upon those shares.

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

The question to be determined depended upon the terms of certain articles of the letters patent which are set out in the judgment of the Judicial Committee. The defendants relied also upon a statement upon the certificates issued by the company until 1928. In that year each of the 100,000 preference shares of $100 had been divided into four preference shares of $25 each, and the 150,000 ordinary shares had been converted into 600,000 ordinary shares without nominal value, there being reserved to each class of share the rights as to dividends previously attaching. Thereafter the certificates issued bore the relevant articles of the letters patent.

The trial judge (Orde J.) gave judgment in favour of the plaintiffs.

Upon appeal that judgment was affirmed by the Appellate Division (Mulock C.J.O., Magee and Middleton JJ.A.; Hodgins and Grant JJ.A. dissenting).

1930. Dec. 2, 4. *Tilley K.C.* and *Horace Douglas* for the appellants.

R. S. Robertson K.C. and *Frank Gahan* for the respondents.

Dec. 18. The judgment of their Lordships was delivered by

Viscount Dunedin. The Steel Company of Canada are a company incorporated by letters patent under the Companies Act of Canada. The capital of the company consisted of 250,000 shares, of which, to quote textually the letters patent—"Two hundred and fifty thousand shares, one hundred thousand shares of one hundred dollars each, that is to say, ten million dollars, be created and issued as preference stock and the same when so issued shall have preference and priority as follows :—

"(*a*) In case of liquidation, dissolution or winding up of the company, the holders of such shares shall be entitled to repayment in preference to ordinary shareholders of the amount of the par value of the said shares and any arrears of dividends thereon, and also the net profits of the company which it shall from time to time be determined to distribute are to be applicable first to the payment of a fixed cumulative preferential dividend at the rate of seven per cent. per annum on the capital paid up on the said preference shares, and the holders of such shares shall participate rateably with the holders of the issued ordinary shares in the distribution of net profits after the holders of the ordinary shares shall have received dividends equal to those paid on the preferred shares;

"(*b*) No dividends shall be paid on the ordinary shares until after the company shall have created and have to the credit of a reserve fund a sum equal at least to one year's dividend on the then issued preference shares."

The shares were afterwards by supplementary letters patent subdivided into smaller amounts, but it was provided that the rights of the shares inter se should remain as before.

The company started in 1910. Up to 1912 it distributed dividends at the rate of 7 per cent. on the preferred shares, but declared no dividend on the ordinary. In 1914 the preference dividend fell to 3½ per cent., but in 1915 it was again 7 per cent., the ordinary shares still receiving nothing. In 1916 the preferred received 10½ per cent., which made up the deficiency in 1914, and the ordinary received 7 per cent. From that time up to 1927 inclusive both preferred and ordinary received 7 per cent.

In 1928 there were surplus profits available after paying 7 per cent. to each class of shareholder, and the directors proposed to pay 8 per cent. to each class. The ordinary shareholders then raised the question which is involved in this action. The action is at their instance against the company and the directors, and asks for an injunction against the directors paying anything more than 7 per cent. to the preferred shareholders until the ordinary shareholders shall have received dividends which will give them on their shares during the whole life of the company the same percentage—namely, 7 per cent.—as the preferred shareholders have received.

The question all turns on the proper interpretation of the words "dividends equal to those paid on the preferred shares." Do they mean as set forth above, or do they mean the sum paid to the preferred shareholders in that actual distribution—namely, 7 per cent.? The share certificates issued did not exactly echo the words used in the letters patent, but it is unnecessary to set forth their terms, as it is beyond controversy that the rights of the parties depend on the terms of the letters patent. A certificate which professed to give other rights would be simply ultra vires of the directors who issued it.

The learned trial judge decided in favour of the contention of the ordinary shareholders, and on appeal his judgment was affirmed by a majority of the Appellate Division. Appeal has now been taken to His Majesty in Council.

Their Lordships are of opinion that the decision of the trial judge affirmed by the Appellate Division was right. The considerations which lead them to that conclusion are as follows:—

The article (*a*) is only dealing with the rights of preferred shares. The right to declare a dividend does not rest on this article, but on a by-law duly passed in terms of the Companies Act. Now the declaration of a dividend need not be only once a year. It may be at any time the directors choose, and there may be several declarations (as, indeed, was done) in the course of one year. Accordingly the preferential dividend is directed to be not "at 7 per cent. per annum" but "at the rate of 7 per cent. per annum." The rate to be applied only speaks when there are profits which the directors determine to distribute, and that distribution is one operation complete in itself. There is only one dividend, whether paid to the preferred shareholder or to the ordinary shareholder. When therefore to describe the dividends paid to the preferred shareholders, equality of payment to which is made the condition precedent to further participation on the part of the preferred shareholders, the expression used is "those dividends" in the plural, that shows that more than the single dividend of the moment is referred to; and it is only after the condition is fulfilled that equality of participation is secured to the preferred shareholder. This equality of participation is an additional privilege. Ordinarily speaking, when a preferred shareholder receives his preferred dividend he can ask no more : *Will* v. *United Lankat Plantations Co.* (1) The fulfilment of the condition alone opens the door for a further participation in profits. The moment that it is realized that " those dividends paid " refer to dividends other than the dividend immediately being dealt with, it is obvious that the whole history of the past is opened.

There is another consideration which strongly points the same way. The rule as laid down is obviously meant to act as a fixed rule on all occasions when distribution occurs, and it would be natural that it should act in a uniform manner as between the respective classes of shareholders. It will do so if the judgment appealed against is right. But if the opposite conclusion were reached, if " dividends paid on the preferred shares " were the dividend paid at that distribution, then the ratio of participation as between the two classes of shareholders in the whole profits distributed will vary according to the action of the directors. Suppose that in a year when there were profits sufficient to warrant a distribution of 7 per cent. to each class the directors thought it more prudent to declare no dividend on the ordinary (and they could not be forced to declare it), and that next year the flourishing state of affairs continued, and the directors decided to divide all their profits, the preferred shareholders would get beside their 7 per cent. for the year, half of the money which would have gone to the ordinary shareholders if there had been a distribution the year before. For be it observed that the directors could not give the ordinary shareholders 14 per cent. ; for, on the assumption that the argument of the appellants prevails, as soon as the ordinary shareholders had got 7 per cent., the participation of the preferred shareholders in anything left over became obligatory.

The learned judges in the minority in the Appellate

(1) [1914] A. C. 11.

Division were impressed with the idea that the trial judge's judgment gave the ordinary shareholders a cumulative dividend. It does no such thing. Arithmetically it may be the case that the amount eventually received by the ordinary shareholders may be the same as if they had had a cumulative dividend. But equally it may not be so. And in any view they are not getting what they do get as a cumulative dividend; they are getting it because they are entitled to have the condition fulfilled before the preferred shareholders can call for participation.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.*
1930
Dec. 2.

SHELL COMPANY OF AUSTRALIA, LIMITED . . . . APPELLANTS;

AND

FEDERAL COMMISSIONER OF TAXATION . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Constitution—Federal Income Tax—Judicial or Administrative Powers—Justices of Federal Courts—Tenure of Office—Income Tax Assessment Act, 1922–1925 (*Commonwealth; No.* 37 *of* 1922—*No.* 28 *of* 1925), *ss.* 41, 44, 50—*Commonwealth of Australia Constitution Act,* 1900 (63 *&* 64 *Vict. c.* 12) *Constitution, ss.* 71, 72.

An Act of the Commonwealth Parliament should not be held to infringe the Constitution of Australia unless it is clear beyond reasonable doubt that it does so.

In that view, the Board of Review created by s. 41 of the (Federal) Income Tax Assessment Act, 1922–1925, to review the decisions of the Commissioner of Taxation, and whose members are to hold office for

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* *Present:* LORD SANKEY L.C., VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, and CHIEF JUSTICE ANGLIN.

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seven years, is not a Court exercising the judicial power of the Commonwealth within the meaning of s. 71 of the Constitution of Australia, but is an administrative tribunal.

Although it became unnecessary so to decide, the Judicial Committee desired to make it quite clear that, as at present advised, they were not prepared to assent to the view that it was competent, either with or without legislation of the Federal Parliament, to appoint justices of the High Court, or of the other Courts created under s. 71 of the Constitution, with other than a life tenure of their office, subject to the power of removal contained in s. 72.

Judgment of the High Court of Australia, 38 C. L. R. 153, affirmed.

Appeal (No. 123 of 1929) by special leave from a judgment of the High Court of Australia, dated August 25, 1926, upon a special case stated by the Supreme Court of Victoria under s. 51A of the (Federal) Income Tax Assessment Act, 1922–1925, and from a judgment of the High Court, dated October 31, 1927, affirming a judgment of the Supreme Court of Victoria, dated September 16, 1927, the two last mentioned judgments being consequent upon that of August 25, 1926.

The appellant company, whose registered name at the date of the assessments hereinafter referred to was the British Imperial Oil Company, Ld., was a company incorporated in Great Britain and carrying on in Australia the business of selling oil, petrol, and petroleum products. The appeal related to an assessment made upon the company in March, 1924, under s. 28 of the (Federal) Income Tax Assessment Act, 1922–1924, in respect of the financial year 1924–1925. The section provides for the assessment of businesses carried on in Australia, but controlled principally by persons resident outside Australia, upon a percentage of their total profits.

The appellants objected to the assessment, but before any further proceedings thereon the High Court of Australia delivered judgment in *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (1), which related to a previous assessment made upon the company. By that judgment the High Court, accepting the present appellants' contentions, held that the Board of Appeal created by s. 41 of the Income Tax Assessment Act, 1922—and as constituted under the Act of 1922–1924—exercised part of the judicial power of the Commonwealth and was therefore a tribunal contrary to ss. 71 and 72 of the Constitution of Australia in that its members were to be appointed not for life but for a period of seven years, and that as the provisions establishing the Board were not severable from the rest of the Act the assessment was invalid. The High Court in so holding applied its decision (Griffith C.J. and Barton, Isaacs, Powers and Rich JJ.; Higgins and Gavan Duffy JJ. dissenting) in *Waterside Workers' Federation of Australia* v. *J. W. Alexander, Ld.* (1), that under the Constitution the judicial power could be vested only in Courts whose members were appointed for life, subject to the power of removal contained in s. 72.

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(1) (1925) 35 C. L. R. 422.

Subsequently to the above decision of 1925 the Commonwealth Parliament enacted the Income Tax Assessment Act, 1925, whereby the 1922–1924 Act was amended, and there was substituted for the Board of Appeal a Board of Review, with provisions as to its functions and procedure differing from those as to the Board of Appeal. The members of the Board of Appeal were however to become the members of the Board of Review, and appointments were, as theretofore, to be for seven years.

On December 1, 1925, the Commissioner disallowed the appellants' objections to the assessment now in question, and pointed out that under s. 50 of the Act as amended they could, if dissatisfied with his decision, request him either to refer his decision to the Board of Review for review, or to treat their objections as an appeal and to forward it either to the High Court or the Supreme Court of the State.

The appellants requested that their objection should be forwarded to the Supreme Court of Victoria. That Court stated a special case for the opinion of the High Court of Australia, which on August 25, 1926, delivered its judgment thereon. The Court (Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.; Knox C.J. dissenting) were of opinion that the Board of Review was not open to the same objections as had been successfully urged against the Board of Appeal. The questions raised by the special case were accordingly answered in favour of the validity of the assessment. The proceedings are reported at 38 C. L. R. 153.

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(1) (1918) 25 C. L. R. 434.

Consequent upon the decision the Supreme Court of Victoria dismissed the appellants' appeal under s. 50 of the Income Tax Assessment Act, 1922–1925, and that judgment was affirmed upon appeal to the High Court.

The terms of the Income Tax Assessment Act, 1922–1924, relative to the Board of Appeal, and of the Act of 1925 relative to the Board of Review substituted therefor, are fully set out in the judgment of the Judicial Committee.

The material provisions of ss. 71 and 72 of the Constitution enacted by the Commonwealth of Australia Constitution Act, 1900, are as follows :—

"71. The judicial powers of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with Federal jurisdiction. . . . .

72. The justices of the High Court, and of the other Courts created by the Parliament—(i) Shall be appointed by the Governor-General in Council : (ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity : . . . ."

1930. June 30 ; July 1, 3, 4, 8, 10, 15, 17, 18. *W. A. Greene K.C.* (with him *Gavin Simonds K.C.* and *Andrewes Uthwatt*) for the appellants. In *Waterside Workers' Federation of Australia* v. *J. W. Alexander, Ld.* (1), the High Court of Australia rightly held that ss. 71 and 72 of the Constitution preclude the Federal Parliament from vesting part of the judicial power of the Commonwealth in a tribunal the members of which are not appointed for life. That view brings the material provisions of the Constitution into accord with those of s. 3 of the Act of Settlement (12 & 13 Will. 3,

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(1) 25 C. L. R. 434.

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c. 12), also with s. 99 of the British North America Act, 1867 (30 & 31 Vict. c. 3). *McCawley* v. *The King* (1) is distinguishable, as the Constitution of Queensland was held to be flexible not rigid, so that it could be amended upon the point in question by the Legislature of the State. In *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (2) the High Court held that the Board of Appeal constituted by the Act of 1922 exercised judicial power and was invalid; there was no appeal to the Board from that decision. There is no difference, essential to the present question, between the functions of the Board of Review and the Board of Appeal. The Board of Review exercises judicial power in that (*a*) its jurisdiction arises only if set in motion by the taxpayer; (*b*) the matter for its decision is a lis between the taxpayer and the Commissioner affecting legal rights; (*c*) its decision is conclusive, subject to an appeal upon questions of law (*d*) the jurisdiction is alternative to an appeal to the Court. A tribunal may be one exercising judicial power although it also exercises administrative power. If the Board acts administratively in deciding between taxpayers and the Commissioner, its decisions are open to debate in the Legislature, and that cannot have been intended. [Reference was made to *Huddart, Parker & Co.* v. *Moorehead* (3); *Rex* v. *Macfarlane* (4); *Royal Aquarium, etc., Society* v. *Parkinson* (5); *Boulter* v. *Kent Justices* (6); *Rex* v. *Howard* (7); *Rex* v. *Woodhouse* (8); *Attwood* v. *Chapman* (9); *Co-partnership Farms* v. *Harvey-Smith*. (10)] The Constitution of Australia should be adhered to strictly, more especially because, as the preamble to the Act of 1900 shows, it embodied an agreement between the Commonwealth and the States; it carefully separates judicial, executive, and legislative functions. The provisions as to the Board of Review are so interwoven with the rest of the Act of 1922–1925 that they

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(1) [1920] A. C. 691.
(2) 35 C. L. R. 422.
(3) (1909) 8 C. L. R. 330.
(4) (1923) 32 C. L. R. 518.
(5) [1892] 1 Q. B. 431.
(6) [1897] A. C. 556.
(7) [1902] 2 K. B. 363.
(8) [1906] 2 K. B. 501.
(9) [1914] 3 K. B. 275.
(10) [1918] 2 K. B. 405.

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are not severable therefrom, so that if the Board of Review is a tribunal repugnant to the Constitution the assessment is invalid: *In re Initiative and Referendum Act* (1); *Rex* v. *Commonwealth Court of Conciliation and Arbitration* (2); *Osborne* v. *The Commonwealth.* (3)

Sir John Simon K.C. and *Somervell K.C.* for the respondents. The decision of the majority of the High Court of Australia in *Waterside Workers' Federation of Australia* v. *J. W. Alexander, Ld.* (4), was wrong for the reasons given by Higgins J. in dissenting. If that is so this appeal fails in limine. The Constitution does not expressly provide that members of Courts created by the Parliament shall not be appointed for a term of years, nor does s. 72 so provide by reasonable implication. The power of removal provided by s. 72 (ii) is a power to remove before the expiration of the period of the appointment. In the absence of s. 72 (ii) a judge could have been removed by proceedings in England, either under 22 Geo. 3, c. 75, or by a reference under s. 4 of the Judicial Committee Act, 1833, or possibly by a writ of scire facias; it was desired to preclude any proceedings of that nature. It is a mistake to suppose that a judge in England can be removed only upon an address of both Houses. Under s. 72 (i) the Governor-General in Council merely appoints. The period for which appointments were to be made was left to be determined by the Federal Parliament, that body being trusted to secure the independence of the judiciary by applying well recognized constitutional principles. It is not disputed that the Federal Parliament can impose qualifications for the appointments for which it provides. Sects. 71 and 72 of the Constitution being silent as to the tenure of the judicial offices to be created, the Federal Parliament had power under s. 51 (xxxix) to legislate on the matter. [Reference was made to Quick and Garran's Constitution of the Australian Commonwealth, 1901, p. 730; Todd's Parliamentary Government in the Colonies, 2nd ed., pp. 828 to 834; Anson's Law and Custom of the Constitution, 2nd ed., Pt. II., pp. 213, 214; Short and Mellor's

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(1) [1919] A. C. 935, 944.

(2) (1910) 11 C. L. R. 1.

(3) (1911) 12 C. L. R. 321.

(4) 25 C. L. R. 434.

Crown Office Practice, 2nd ed., p. 398; British North America Act, 1867, ss. 99, 101; South Africa Act, 1909, s. 101.]

But whatever is the effect of the Constitution the Board of Review was validly created, because an examination of the provisions of the Act of 1922–1925 shows that the Board exercises administrative and not judicial power. It is not disputed that the Commissioner acts administratively. The effect of s. 50 of the Act is that a taxpayer dissatisfied with the Commissioner's decision has the choice either to have the decision reviewed by another administrative body, or of appealing to the Courts. Cases referred to for the appellants show that a body may act administratively although it functions like a Court in many respects, e.g., hearing witnesses under oath, deciding between two or more contending parties. Further, a body may be administrative though it decides matters referred to it by another body, and its decision takes the place of that other body's decision: *Rex* v. *Electricity Commissioners*. (1) The category of bodies against which a writ of certiorari can be issued is wider than that of Courts of justice: *Reg.* v. *St. Mary Abbotts, Kensington* (*Assessment Committee*). (2) If it should appear that the functions assigned to the Board of Review may be regarded as either judicial or administrative, the provisions of the Act should be held to be valid rather than an infringement of the Constitution. A decision contrary to the respondent's contention upon the first point would narrow the meaning to be given to judicial power in considering the second point. [Reference was made also to *Cornell* v. *Deputy Federal Commissioner of Taxation* (3) and *Thomson* v. *Federal Commissioner of Taxation*. (4)] Even if the Board of Review was an invalid body that does not make the whole Act invalid having regard to s. 2 of the Colonial Laws Validity Act, 1865. The offending provisions are not "so interwoven into the scheme of the Act" that that result would follow: *In re Initiative and Referendum Act*. (5) The appellants having

(1) [1924] 1 K. B. 171, 205.
(2) [1891] 1 Q. B. 378, 382.
(3) (1920) 29 C. L. R. 39.
(4) (1923) 33 C. L. R. 73.
(5) [1919] A. C. 935, 944.

elected to appeal to the Court, cannot complain on the ground that their alternative remedy was invalid.

W. A. Greene K.C. in reply. The *Waterside Workers' Federation* case (1) was decided in 1918, there was no appeal to this Board, and the decision has since been followed in Australia. Had it been intended in the Constitution of Australia to diverge from well recognized principles as to the tenure of office of judges that would have been clearly expressed. Ambiguous language should not be taken to effect a departure from recognized constitutional usage: *Viscountess Rhondda's Claim.* (2) Sect. 72 applies equally to justices of the High Court as to those of other Courts created. The High Court was created by the Constitution itself, so that the tenure of office of its justices is not a matter incidental to the execution of a power vested in the Parliament and so within s. 51 (xxxix). Further, by s. 72 (i), the Governor-General in Council has power to make appointments of all justices, s. 72 (ii) providing how the appointments shall be terminable ; the Federal Parliament cannot under s. 51 (xxxix) limit the power of the Governor-General in Council by providing that an appointment shall terminate otherwise. One of the objects of s. 72 (ii) may have been to prevent proceedings in England for the removal of judges, although proceedings by scire facias and probably proceedings under 22 Geo. 3, c. 75, are appropriate only to appointments by patent, but that was not the only or the chief object. In art. 68 of the Constitution enacted by the Irish Free State Constitution Act, 1922, there is no express provision that appointments are to be for life.

Upon the question whether the Board of Review exercised judicial power reference was made to: per Griffith C.J. in *Waterside Workers' Federation* case (3) ; *U. S.* v. *Ferreira* (4) ; *U. S.* v. *Ritchie* (5) ; *Prentis* v. *Atlantic Coast Line Co.* (6) ; and Story on the Constitution, 5th ed., vol. ii., para. 1574.

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(1) 25 C. L. R. 434.
(2) [1922] 2 A. C. 339, 375.
(3) 25 C. L. R. 434, 442.
(4) (1851) 13 Howard, 40.
(5) (1854) 17 Howard, 525.
(6) (1908) 211 U. S. 210.

Dec. 2. The judgment of their Lordships was delivered by

LORD SANKEY L.C. This is an appeal by special leave granted by order of the King in Council dated January 29, 1929, from two judgments of the High Court of Australia, dated respectively August 25, 1926, and October 31, 1927.

The judgment dated August 25, 1926, was given on a special case stated by the Supreme Court of Victoria arising out of an assessment on the appellants to Federal income tax for the financial year 1924–5. The judgment dated October 31, 1927 (following upon the decision of the case stated), dismissed an appeal of the appellants from a judgment of the Supreme Court dated September 16, 1927, which, following also upon the same decision, had dismissed outright the appeal against the assessment made by the appellants to that Court.

In their appeal to His Majesty in Council against these judgments the appellants have disputed the validity of certain Federal Income Tax Assessment Acts under which they were assessed as being contrary to ss. 71 and 72 of the Constitution of the Commonwealth which is set forth in s. 9 of the Commonwealth of Australia Constitution Act, 1900. Although the facts upon which that contention is based are undisputed they are of a complicated character and the law applicable to them is somewhat intricate, but many points raised and decided in the High Court were not again ventilated on the appeal, and the questions that were actually argued before their Lordships may be compendiously stated as follows :—

1. Is the Board of Review, which, under s. 41, sub-s. 1, of the Australian Income Tax Assessment Act, 1922–25, is constituted to review the decisions of the Commissioner of Taxation, a Court exercising the judicial power of the Commonwealth within the meaning of s. 71 of the Constitution above referred to, or is it merely an executive or administrative tribunal ?

2. If it is a Court exercising the judicial power of the Commonwealth, can the members thereof be appointed for a term of years, or must they be appointed for life subject to the power of removal contained in s. 72 ?

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Under s. 41 of the Income Tax Assessment Act, 1922–25, members of the Board of Review are appointed for seven years. The broad case of the appellants accordingly was: 1. That the Board was a Court exercising the judicial power of the Commonwealth. 2. That the appointment of the members of such a Court for a term of years was unconstitutional; and 3. That as a necessary result, an assessment made upon the appellants for Federal income tax, and justified only by a statute unconstitutional in that respect, could not be upheld.

Before the Board, each one of these assertions was challenged by the respondent. The first of them, especially, had failed in the Court below. The High Court of Australia by a majority (Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ., Knox C.J. only dissenting) had held that the Board of Review was an administrative or executive tribunal and that consequently objection taken to the limited tenure of office by its members was not well founded. It was to the decision on that point that the present appeal as argued on behalf of the appellants was confined. Learned counsel for them did not before the Board contend that the appeal could succeed on any other ground if it failed there. As to the second of the above questions, it was not contested in the High Court by the respondent for the reason that, so far as that Court was concerned, the matter was concluded by its own decision in the year 1918, in the case of *Waterside Workers' Federation of Australia* v. *J. W. Alexander, Ld.* (1), where it was held, to quote the words of Knox C.J. in *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (2): "that the judicial power of the Commonwealth can only be vested in 'Courts" that is, in Courts of law in the strict sense; and that, if any such Court be created by Parliament, the tenure of office of the Justices of such Court, by whatever name they may be called, shall be for life subject to the power of removal contained in s. 72 of the Constitution." The decision in the *Waterside Workers' Federation* case (1), however, not being a decision binding on their Lordships' Board, the respondent

(1) 25 C. L. R. 434.

(2) 35 C. L. R. 422, 432, 433.

at the hearing, as a further answer to the appeal, contested its correctness and submitted that it should now be overruled.

The appellants are a company duly incorporated in Great Britain and carry on in the Commonwealth of Australia the business of selling oil, petrol and petroleum products, from which they have derived income taxable under the Income Tax Assessment Acts of the Commonwealth of Australia. Their business is controlled principally by persons resident outside Australia. The present difficulty originates in that fact, inasmuch as, in the view of the Federal Commissioner of Taxation, it brought the appellants within the exceptional taxing provisions of s. 28 of the Income Tax Assessment Act, 1922.

That section, so far as is now material, was in the following terms: "(1.) When any business which is carried on in Australia is controlled principally by persons residing outside Australia, and it appears to the Commissioner that the business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business, the person carrying on the business in Australia shall be assessable and chargeable with income tax on such percentage of the total receipts (whether cash or credit) of the business, as the Commissioner in his judgment thinks proper. . . . . (3.) A taxpayer who is dissatisfied with the decision of the Commissioner under this section may require the Commissioner to refer his case to a Board of Appeal, and the Commissioner shall refer the case accordingly."

The principal sections of the Act relating to the Board of Appeal in this last sub-section mentioned have been constantly under reference in the present case, both in the judgments delivered in the High Court and in the course of the arguments before the Board, and it is not inconvenient at once to set them forth: it will be found that a comparison between them and statutory provisions relating to Boards of Review substituted for them in 1925, and later set forth, may be of assistance to the decision of the appeal. They are to be found in Part V. of the Act which deals with "objections and appeals" and are as follows:—

"41.—(1.) For the purposes of this Part, there shall be a Board or Boards of Appeal. . . . . (4.) The members of a Board shall hold office for a term of seven years, but shall be eligible for reappointment.

44.—(1.) A Board of Appeal shall have power to hear such cases as are prescribed, or are referred to it by the Commissioner under this Act. (2.) The provisions of ss. 51, 52 and 53 of this Act shall apply, so far as applicable, to references by the Commissioner to the Board as if these references were appeals.

50.— . . . . (5.) Objections which are treated as appeals to a Board of Appeal shall, if the taxpayer's written request is accompanied by a deposit of such amount as is prescribed for the particular class or case, be forwarded to the Board of Appeal by the Commissioner not later than thirty days after receipt by him of the written request. (6.) A taxpayer shall be limited on the hearing of his appeal to the grounds stated in his objection. (7.) If the assessment has been reduced by the Commissioner after considering the objection, the reduced assessment shall be the assessment appealed from. (8.) When the appeal is to the High Court or a Supreme Court, it shall be heard by a single Justice of the Court.

51.—(1.) On the hearing of the appeal, the Court or Board of Appeal may make such order as it thinks fit, and may either reduce or increase the assessment. (2.) An order of the Board on questions of fact shall be final and conclusive on all parties. (3.) An order by the Court shall be final and conclusive on all parties except as provided in this section. (4.) The costs of the appeal shall be in the discretion of the Court or the Board, as the case may be. (5.) The Board shall, if it considers an appeal to be frivolous or unreasonable order the forfeiture of the whole or part of the amount mentioned in sub-s. 5 of the last preceding section. (6.) On the hearing of the appeal the Board shall, on the request of a party, and the Court may, if the Court thinks fit, state a case in writing for the opinion of the High Court upon any question arising in the appeal which in the opinion of the Board or of the Court, as the case may be, is a question of law. (7.) The High Court shall hear and determine the question, and remit the case with its opinion to the Court below or to the Board, as the case may be, and may make such order as to costs of the case stated as it thinks fit. (8.) An appeal shall lie to the High Court, in its appellate jurisdiction, from any order made under sub-s. 1 of this section except a decision by the Board on a question of fact."

The Commissioner, acting upon his view, already stated, that s. 28, as just set forth, applied to the appellants, proceeded, instead of assessing them to income tax upon the taxable income derived from their business, to assess and charge them with income tax upon ten per cent. of the total receipts (whether cash or credit) of their business. The appellants did not accept that position. On the contrary they at once took steps to question its correctness in relation to the first assessment upon them—the assessment for the financial year 1922–1923—and in 1924 that dispute was still undecided. In relation to the assessment now under review—that for 1924–1925—the appellants took up the same position. They treated themselves as ordinary taxpayers, and, on September 30, 1924, pursuant to s. 32 of the Income Tax Assessment Act, 1922–23, furnished in due form to the respondent a return setting forth a statement of the income derived by them during the year beginning July 1, 1923, and ending June 30, 1924. In response, the respondent, once more purporting to act under the above stated section on March 28, 1925, gave notice to the appellants that he had assessed the Federal Income Tax payable by them for the financial year 1924–25 (i.e., in respect of income derived during the year ending June 30, 1924) at 21,365*l*. 17*s*., being an amount equal to one shilling in the pound on ten per centum of the appellants' gross receipts for such period, which gross receipts were 4,273,169*l*.

The appellants on May 4, 1925, lodged with the respondent an objection in writing against the said assessment and in such objection challenged the validity of the

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assessment and of the legislation under which it purported to be made.

The case which the appellants then proposed to put forward under their objections was that which they had already made with reference to the 1922–23 assessment, and it turned mainly upon the provisions above quoted of the Income Tax Assessment Act, 1922, with reference to the status of the Board of Appeal. That Board was, they objected, a "Court" exercising the judicial power of the Commonwealth, and was unconstitutional in that it was composed of members appointed only for a term of years. To their objection the Commissioner made no immediate answer, and by December 1, 1925, when for the first time he did respond, the situation as it stood at the date of the objections had greatly changed.

In the first place, the objections taken by the appellants to the assessment of 1922–23 were during that interval disposed of by the High Court of Australia and in the sense contended for by the appellants. (Incidentally, and to avoid confusion, it should be stated here that these objections were taken by the appellants under their then registered name of the British Imperial Oil Company, and it is under that name that the proceedings with reference to them are reported in (1925) 35 C. L. R. 422.) In that instance the appellants required their objections to the assessment then made upon them to be referred to the Board of Appeal under s. 28, sub-s. 3, of the Act of 1922, and with reference to these objections that Board stated a case for the opinion of the High Court of Australia, submitting therein (inter alia) the following questions: "1. Is s. 28 of the Income Tax Assessment Act 1922, and are the Income Tax Acts 1922 and 1923 so far as they operate thereon, within the legislative powers of the Parliament of the Commonwealth? 2. Is the Income Tax Assessment Act 1922, and are the Income Tax Acts 1922 and 1923, within the legislative powers of the Parliament of the Commonwealth?"

The contentions put forward by the appellants have been already indicated. More particularly they were: (*a*) That ss. 44, 50 and 51 of the Income Tax Assessment Act, 1922, sought to confer judicial power upon the Board of Appeal, and that as that Board did not have a life tenure (s. 41) the attempted conferring of judicial power was, having regard to ss. 71 and 72 of the Constitution, invalid. (*b*) That s. 28, sub-s. 3, of the Income Tax Assessment Act, 1922, being thus invalid, the whole of s. 28 was invalid, because sub-s. 3 was not severable from the rest of the section.

In making the above contentions the appellants, as in the present case, relied upon the interpretation of the Constitution settled by the decision of the High Court in *Waterside Workers' Federation of Australia* v. *J. W. Alexander, Ld.* (1), already referred to. As has been stated, the High Court accepted these contentions of the appellants, and the Board of Appeal being on that footing invalidly constituted, the Court by its judgment, dated April 9, 1925, ordered that the case stated by it should be struck out.

No appeal against that judgment was brought by the respondent, but, doubtless as a result of it, an amending Federal statute was passed and became law on September 26, 1925, this being the second event which brought about the change in the previously existing situation already referred to. Under this amending Act, the Board of Appeal disappeared and a Board of Review was constituted in its place, the sections of the 1922 Act already set forth being dealt with so far as is presently material in the following way.

By s. 7 of the new Act—which by s. 24 thereof was to be deemed to have commenced upon the date of the commencement of the Act of 1922—s. 28 of the Act of 1922 was amended by omitting sub-s. 3.

By ss. 9, 10, 11 and 12, ss. 41, 44, 50 and 51 of the Act of 1922 were so dealt with as to produce the result following :—

" 9. Section forty-one of the principal Act is amended—(*a*) by omitting from sub-s. 1 thereof the word ' Appeal ' and inserting in its stead the word ' Review ' ; and (*b*) by omitting sub-s. 3 thereof and inserting in its stead the following subsection : (3.) The persons who were, prior to the commencement of this section, appointed, in relation to income tax,

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(1) 25 C. L. R. 434.

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to be members of a Board of Appeal, shall be deemed, as from the commencement of this Act, to have been appointed to be members of a Board of Review and shall continue to hold office as such members as if appointed under this Act."

10. Section forty-four of the principal Act is repealed and the following section inserted in its stead :—

"44.—(1.) A Board of Review shall have power to review such decisions of the Commissioner, Assistant Commissioner or Deputy Commissioner as are referred to it by the Commissioner under this Act and, for the purpose of reviewing such decisions, shall have all the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act, and such assessments, determinations and decisions of the Board, and the decisions of the Board upon review, shall, for all purposes (except for the purposes of sub-s. 4 of s. 50 and sub-s. 6 of s. 51 of this Act) be deemed to be assessments, determinations or decisions of the Commissioner. (2.) Notwithstanding anything contained in this Act, a determination made by the Board under s. 21 of this Act shall not be invalidated by reason of the fact that it is not made within the time prescribed by that section.

11. Sect. 50 of the principal Act is amended by omitting sub-ss. 4, 5, 6, 7 and 8 thereof and inserting in their stead the following sub-section: "(4.) A taxpayer who is dissatisfied with the decision of the Commissioner, Assistant Commissioner or Deputy Commissioner may within thirty days after the service by post of notice of that decision—(*a*) in writing, request the Commissioner to refer the decision to a Board of Review for review; or (*b*) in writing, request the Commissioner to treat his objection as an appeal and to forward it either to the High Court or to the Supreme Court of a State."

12. Sect. 51 of the principal Act is repealed and the following sections inserted in its stead :—

"51.—(1.) Where a taxpayer has, in accordance with the last preceding section, requested the Commissioner to refer a decision to a Board of Review, the Commissioner shall, if the taxpayer's request is accompanied by a deposit of such amount as is prescribed for the particular class of case, refer the decision to the Board not later than thirty days after receipt of the request. (2.) A taxpayer shall be limited on the review to the grounds stated in his objection. (3.) If the assessment has been reduced by the Commissioner after considering the objection, the reduced assessment shall be the assessment to be dealt with by the Board under the next succeeding sub-section. (4.) The Board, on review, shall give a decision and may either confirm the assessment or reduce, increase or vary the assessment. (5.) The Board may, if it considers the reference to be frivolous or unreasonable, order the forfeiture of the whole or part of the amount deposited in accordance with sub-s. 1 of this section. (6.) The Commissioner or a taxpayer may appeal to the High Court from any decision of the Board under this section which, in the opinion of the High Court, involves a question of law.

51A.—(1.) Where a taxpayer has, in accordance with s. 50 of this Act, requested the Commissioner to treat his objection as an appeal and to forward it to the High Court or the Supreme Court of a State, the Commissioner shall forward it accordingly. (2.) The appeal shall be heard by a single justice of the Court. (3.) A taxpayer shall be limited, on the hearing of the appeal, to the grounds stated in his objection. (4.) If the assessment has been reduced by the Commissioner after considering the objection, the reduced assessment shall be the assessment appealed from. (5.) On the hearing of the appeal, the Court may make such order as it thinks fit, and may reduce, increase or vary the assessment. (6.) An order of the Court shall be final and conclusive on all parties except as provided in this section. (7.) The costs of the appeal shall be in the discretion of the Court. (8.) On the hearing of the appeal, the Court may, if it thinks fit, state a case in writing for the opinion of the High Court upon any question which in the opinion of the Court is a question of law. (9.) The High Court shall hear and determine the question, and remit the case with its opinion to the Court below, and may make such order as to costs of the case stated as it thinks fit. (10.) The Commissioner or a taxpayer may appeal to the High

Court, in its appellate jurisdiction, from any order made under sub-s. 5 of this section."

Finally, s. 16 of this amending Act is in these terms: "Every assessment, determination or decision of the Commissioner . . . . made under the Income Tax Assessment Act 1922 . . . . shall be as valid and effectual as if made under the principal Act, as amended by this Act, and, for the purposes of such assessment, determination or decision, the amendments contained in ss. 3, and 5 to 14 inclusive, of this Act shall be deemed to have been in force at the time the assessment, determination or decision was made or given."

Such then was the position with regard to the appellants' objections to the present assessment when, on December 1, 1925, the respondent, by notice in writing, disallowed them all. The response of the appellants was immediate. On December 24 they requested the respondent to treat their objections as an appeal and to forward them to the Supreme Court of the State of Victoria.

The appellants, it will be seen, in taking this course did not exercise the right given them by the amending Act, to have the Commissioner's decision referred to the Board of Review. They chose one of the other two alternatives open to them.

It follows that the constitutionality of the Board of Review in the present case only arises on the contention that the provisions of s. 28 of the Income Tax Assessment Act, 1922–1925, are inseparably connected with those of s. 50, sub-s. 4 (*a*), of the same Act as enacted in 1925 which give to the appellants the right to have the Commissioner's decision referred to the Board of Review, and that the former stand or fall with the latter. This contention, it should at once be stated, was disputed by the respondent and a submission in the contrary sense was put forward by him as a separate answer to the present appeal.

The objections came before the Supreme Court of the State of Victoria (Macfarlan J.) on May 7, 1926, when His Honour, after discussion, stated a case in writing for the opinion of the High Court upon the following questions:

"1. Did the assessment cease to be valid or operative upon the raising of the dissatisfaction of the appellants therewith? 2. Is the assessment appealed against good in law?"

The case as so stated was argued before the High Court of Australia, judgment given upon August 25, 1926, and the answers given by the Court, Knox C.J. dissenting, were to (1.) "No," and to (2.) "Yes."

The ground upon which the majority of the learned judges of the High Court proceeded when so answering these questions was that in their opinion, the Board of Review, if in the present case the objections of the appellants had been referred to it, would not in entertaining them have been a Court exercising the judicial power of the Commonwealth, but would have been merely a tribunal engaged in the administration of the statutes and one, therefore, quite properly constituted. The great question which has been argued on the appeal is whether the learned judges were right in that conclusion.

Now, it is hardly doubtful that the Federal Legislature, accepting, as presumably it did, the correctness of the High Court's judgment of April 9, 1925, set itself by its amending Act of 1925 to get over the administrative difficulties which that judgment created. Indeed, a close examination of the sections of the new Act already set forth shows that suggestions to that end made by the learned judges who took part in the decision have therein been adopted and embodied. The learned counsel for the appellants urged that not only had the Federal Legislature no power to do as it did, but that, in effect, it had not succeeded in creating a new tribunal (the Board of Review) which was more valid than the old tribunal (the Board of Appeal). Without any disrespect, he suggested that the new Board of Review was, in effect, in just the same position as the old Board of Appeal, and that the legislation was camouflage.

It becomes necessary, therefore, to examine somewhat minutely not only the difference between the old Board of Appeal and the new Board of Review, but to consider the position of the Board of Review itself.

It seems clear to their Lordships, as appears from a comparison of the provisions on the subject of the Act of 1922, with those of the Act of 1925, that there is a very real difference between the two Boards; a difference which, in the present case, is well worked out in the judgment of Isaacs J., where he sums up the situation in that regard.

After pointing out that amongst other sections of the 1922 Act, s. 28 was altered by leaving, so far as that section is concerned, the Commissioner's decision absolutely final, and that this was done by eliminating all reference to a Board, the learned judge proceeds: "(*c*) In s. 41 the title of the Board was altered from 'Board of Appeal' to 'Board of Review.' (*d*) Sect. 44, which previously expressly applied sections creating judicial powers to the Board, is absolutely transformed. Instead of assimilating the Board to the Court, as in the old s. 44, the Board in the new s. 44 is assimilated to the Commissioner. Instead of the Board being given the powers and functions of the Court, it is given 'the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act.' Those are the only powers and functions conferred upon the Board for the purposes of decision. Other powers of formulation *after* decisions are given, but these are incidental only. (*e*) Sect. 44 then takes up the 'decisions' of the Board and says they are for all purposes (with certain exceptions) to be deemed those 'of the Commissioner.' (*f*) The first exception is patently immaterial here. It is merely to prevent the taxpayer having a double choice instead of an alternative choice of tribunal from the Commissioner. (*g*) The second exception, when carefully examined, is really to negative the notion of the Board being judicial. It allows an appeal to the Court from any decision which, in the opinion of the Court, is a question of law. . . . . The fact that the Commissioner may appeal as well as the taxpayer only indicates that the Crown as well as the subject may invoke the Court to correct a misconstruction of the law, which would, of course, affect not merely that taxpayer but all taxpayers in a similar position. (*h*) The Board's decision, when given, may, by

s. 51, sub-s. 4, be formalized by confirming, reducing, increasing or varying the assessment. This is form only. (*i*) By the next sub-section it may order the forfeiture of the deposit if it thinks the reference frivolous or unreasonable. Administrative 'orders' are numerous, and, in this instance, the exercise of the power rests, not on law, but on opinion. In any event, the sub-section is quite subsidiary."

Starke J., speaking of the Board of Review, describes its position as follows: "It has power to review the assessments of the Commissioner, and its decisions are to be deemed to be assessments, determinations or decisions of the Commissioner (Act No. 28 of 1925, s. 10). Now, the Commissioner causes assessments to be made for the purpose of ascertaining the taxable income upon which income tax shall be levied (Act 1915–1921, s. 31; Act of 1922, s. 35). His function is to ascertain the amount of income upon which the tax is imposed. That does not, in my opinion, involve any exercise of the judicial power of the Commonwealth; it is an administrative function. The decision of a Board of Review stands, as we have seen, precisely in the same position. Its functions are in aid of the administrative functions of government. So far, then, a Board does not exercise the judicial power of the Commonwealth. We then come to the right of appeal to this Court from determinations of Boards of Review. That is a right given both to the Commissioner and to the taxpayer. A right of appeal in itself does not establish the vesting of judicial power either in the Commissioner or in a Board of Review. The Parliament may have imposed upon the Courts the duty of reviewing administrative determinations."

Is this right? What is "judicial power"? Their Lordships are of opinion that one of the best definitions is that given by Griffith C.J. in *Huddart, Parker & Co.* v. *Moorehead* (1), where he says: "I am of opinion that the words 'judicial power' as used in s. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between

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(1) 8 C. L. R. 330, 357.

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itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

This definition of "judicial power" suggests to their Lordships a further material difference in the status of the two Boards not alluded to by Isaacs J.

It will have been noticed that under the new s. 51A, the orders which the Court, under sub-s. 5, may make are by sub-s. 6 made final and conclusive on all parties except as provided by the section; and that by sub-s. 10, it is provided that the Commissioner or a taxpayer may appeal to the High Court in its appellate jurisdiction from any order made by the Court under sub-s. 5. But under the new s. 51, dealing with the orders of the Board of Review, there is no provision in any way corresponding to these sub-ss. 6 and 10 of s. 51A. The orders of the Board of Review are not there stated to be conclusive for any purpose whatsoever. On the other hand, under s. 51, sub-s. 2, of the Act of 1922, the orders of the Board of Appeal on questions of fact were expressly declared to be final and conclusive on all parties.

The distinction is, their Lordships think, both striking and suggestive. The decisions of the Board of Review are under the amending Act made the equivalent of the decision of the Commissioner. No assessment of his, even when paid, is conclusive upon him. He retains under s. 37 the fullest power of subsequent alteration or addition, and it would appear that that power remains with him notwithstanding any decision in respect of the same assessment by the Board of Review. It is only the decision of the Court which, in respect of an assessment, is now made final and conclusive on all parties: a convincing distinction, as it seems to their Lordships, between a "decision" of the Board and a "decision" of the Court.

The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power.

It is conceded in the present case that the Commissioner himself exercised no judicial power. The exercise of such power in connection with an assessment commenced, it was said, with the Board of Review, which was in truth a Court.

In that connection it may be useful to enumerate some negative propositions on this subject: 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body. See *Rex* v. *Electricity Commissioners*. (1)

Their Lordships are of opinion that it is not impossible under the Australian Constitution for Parliament to provide that the fixing of assessments shall rest with an administrative officer, subject to review, if the taxpayer prefers, either by another administrative body, or by a Court strictly so called, or, to put it more briefly, to say to the taxpayer "If you want to have the assessment reviewed judicially, go to the Court. If you want to have it reviewed by business men, go to the Board of Review."

It has been seen that by s. 50 of the 1922–25 Act, a taxpayer who is dissatisfied with the decision of the Commissioner may request him (*a*) to refer the decision to a Board of Review for review, or (*b*) to request the Commissioner to treat his objection as an appeal and to forward it either to the High Court or to the Supreme Court of a State.

Sect. 51 which regulates reference to the Board is to be compared with s. 51A, which regulates appeals to the Court. The differences between the two sections have already been referred to. The sections may again in this connection usefully be contrasted. Although superficially apparently minute, the contrast indicates that the status and function of the two tribunals are by no means the same. The Board of Review appears to be in the nature of administrative machinery to which the taxpayer can resort at his option in order to have his contentions reconsidered.

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(1) [1924] 1 K. B. 171.

An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. Mere externals do not make a direction to an administrative officer by an ad hoc tribunal an exercise by a Court of judicial power.

Their Lordships find themselves in agreement with Isaacs J., where he says: "There are many functions which are either inconsistent with strict judicial action . . . . or are consistent with either strict judicial or executive action. . . . . If consistent with either strictly judicial or executive action, the matter must be examined further. . . . . The decisions of the Board of Review may very appropriately be designated . . . . 'administrative awards,' but they are by no means of the character of decisions of the Judicature of the Commonwealth." They agree with him also when he says that "unless . . . . it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will."

In that view they have come to the conclusion that the legislation in this case does not transgress the limits laid down by the Constitution, because the Board of Review are not exercising judicial powers, but are merely in the same position as the Commissioner himself—namely, they are another administrative tribunal which is reviewing the determination of the Commissioner who admittedly is not judicial, but executive.

As to the second point—namely, "Whether it is competent to appoint to a Court, strictly so-called, judges for a term of years," the opinion of their Lordships that the Board of Review acts as an executive body and is not a Court within the meaning of s. 71 of the Constitution is sufficient to determine the fate of this appeal, and renders it unnecessary to pronounce any formal judgment upon the question which was argued as to tenure of judicial office. But though relieved of the necessity of giving a decision upon the point, their

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Lordships desire to make it quite clear that, as at present advised, they are not prepared to assent to the view that it is competent, either with or without legislation by the Federal Parliament, to appoint justices of the High Court or of the other Courts created by the Parliament under s. 71 of the Constitution, with other than a life tenure of their office.

It is not necessary to consider the various other points which emerged during argument. Counsel for the appellants, at the Bar, finally accepted the position that if the Board of Review was validly constituted, or in other words, if it is an executive as distinguished from a judicial tribunal, the judgment of the High Court of Australia must stand. Their Lordships have arrived at the conclusion that the Board of Review is an administrative as distinguished from a judicial tribunal, and in these circumstances will humbly advise His Majesty to dismiss this appeal, with costs.

Solicitors for appellants: *Waltons & Co.*
Solicitors for respondent: *Coward, Chance & Co.*

[PRIVY COUNCIL.]

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STEAMSHIP EURANA . . . . . . APPELLANT;

AND

BURRARD INLET TUNNEL AND BRIDGE COMPANY . . . . . RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Canada — Statutory Powers — Special and general Acts — Railways — Bridge over navigable Waters — Interference with Navigation — Railway Act (R. S. Can., 1927, *c.* 170), *ss.* 3, 268.

Where a special Act of the Dominion Legislature has authorized the construction of a bridge carrying a railway over a navigable channel "so as not to interfere with navigation," and has incorporated the Railway Act, an order made by the Railway Board under s. 268 of that Act, which empowers the Board to authorize the construction of a bridge over navigable waters according to plans approved by the Governor in Council, affords no defence to a claim in respect of damage caused to a ship by reason of the bridge constructed being a substantial interference with navigation and therefore a public nuisance. The protection of the public right of navigation being dealt with both in the special Act and in the general Act, the express provision of the special Act overrides those of the general Act, both having regard to s. 3 of the Railway Act and apart therefrom.

Canadian Pacific Ry. Co. v. *City of Toronto* [1911] A. C. 461 distinguished.

Judgment of the Exchequer Court of Canada [1930] Ex. C. R. 38 reversed.

APPEAL (No. 67 of 1930) from a judgment of the Exchequer Court of Canada (December 8, 1929) affirming a judgment of the Admiralty Court, British Columbia District, which dismissed a counterclaim by the owners of the appellant ship.

In March, 1927, the appellant ship while entering Vancouver harbour collided with a bridge, constructed and owned by the respondents, which carried a road and railway over a navigable channel. Both the bridge and the ship were damaged. The respondents brought an action to recover damages from the shipowners, and the shipowners

* *Present:* LORD MERRIVALE, LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and SIR LANCELOT SANDERSON.

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counterclaimed for damage to the ship, alleging that the bridge was a wrongful obstruction to the navigation of the harbour.

The material facts, the provisions of the respondents' special Act, and of the material sections of the Railway Act, which was incorporated, appear from the judgment of the Judicial Committee.

Both Courts in Canada found that the ship was not to blame for the collision, and there was no appeal from the dismissal of the respondents' claim. With regard to the counterclaim the trial judge (Martin J.) found that the bridge substantially increased the difficulties of navigation in the harbour, but that the shipowners had no cause of action, as the bridge in its existing form had been authorized by statute, having regard to certain orders made by the Railway Board under the Railway Act. Upon appeal to the Exchequer Court, the learned President (Maclean J.) affirmed the view of the trial judge that the bridge was authorized by statute.

The judgment of the Exchequer Court is reported at [1930] Ex. C. R. 38.

1930. Nov. 10, 11, 13, 14. *M. Griffin K.C.* and *G. St. C. Pilcher* for the appellant. The respondents' special Act authorized them to construct a bridge only "so as not to interfere with navigation." The evidence shows that the bridge was an interference, and a substantial interference, with navigation. The bridge being a work expressly excluded from what was authorized by the special Act could not be given statutory authority by any order of the Railway Board. Having regard to s. 3 of the Railway Act, and upon general principles, the provision of the special Act as to the public right of navigation, overrides the provisions of the Railway Act, even if that Act ever empowers the Railway Board to take away public rights: *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1); *A.-G. for British Columbia* v. *Canadian Pacific Ry. Co.* (2); *Rex* v. *Woldingham* (3); *Champion* v. *City of Vancouver* (4), and other Canadian decisions.

(1) (1872) L. R. 8 Ch. 125.

(2) [1906] A. C. 204, 211, 212.

(3) [1925] Ex. C. R. 85.

(4) (1918) 1 Western Weekly Reporter, 216 (S. C. Can.).

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Moreover the evidence shows that the requirements of the Railway Act were not strictly complied with. Further, the Navigable Waters Protection Act (R. S. Can., 1906, c. 115), which dates from 1886, applied, and the procedure under that Act was not followed. Statutory requirements must be strictly complied with, even if more than one Act applies: *Brownlow* v. *Metropolitan Board of Works.* (1) The Crown grant of land to the respondents expressly reserved to the Crown all rights of navigation, and that reservation enures to the benefit of members of the public: *Lyme Regis Corporation* v. *Henley* (2); *Grand Trunk Pacific Ry. Co.* v. *British Columbia Express Co.* (3)

Donaghy K.C. and *Theobald Mathew* (*Edmondson* with them) for the respondents. A reasonable meaning should be given to the language of the special Act. The true effect of the Act was to constitute the Governor in Council and the Railway Board statutory authorities to decide whether a bridge in accordance with the plans submitted would be one contrary to the provision in the special Act. That being the true effect of the Act the principle embodied in s. 3 is not applicable. The Railway Act itself by s. 245 prohibits interference with free navigation, and it is provided by s. 248 that upon a construction order under that section the company shall be authorized to construct the work in accordance with the plans submitted. The contention for the appellant ship would render that provision nugatory. The requirements of the Railway Act were complied with, and the orders made by the Railway Board accordingly gave the respondents statutory authority: *Canadian Pacific Ry. Co.* v. *City of Toronto.* (4) As the bridge was constructed under the authority of the Parliament of Canada s. 3 of the Navigable Waters Protection Act prevents that Act from applying.

M. Griffin K.C. replied.

Jan. 13. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from a judgment of the

(1) (1864) 16 C. B. (N. S.) 546.
(2) (1834) 2 Cl. & F. 331, 354.
(3) (1916) 55 Can. S. C. R. 328, 340.
(4) [1911] A. C. 461.

President of the Exchequer Court of Canada dismissing an appeal from the trial judge in Admiralty for the Admiralty district of British Columbia.

The action was brought by the Burrard Inlet Tunnel and Bridge Co., the present respondents, hereafter called "the Bridge Company," against the owners of the steamship *Eurana* for damages sustained by the Bridge Company through the ship coming into collision with their bridge over the second narrows in the harbour of Vancouver. The shipowners counterclaimed against the Bridge Company in respect of the damage to their ship caused by the collision, alleging that the bridge was a wrongful obstruction to the navigation of the harbour. Both claim and counterclaim were dismissed by the trial judge, and on appeal by the shipowners the judgment dismissing their counterclaim was affirmed by the President of the Exchequer Court.

The harbour of Vancouver runs for some miles inland easterly from the sea. At two points known as the first and the second narrows the waterway is contracted. The bridge in question is built over the second narrows. It carries both a railway track and a road track and appears to afford a valuable connection between N. and S. Vancouver and the railways on either side of the harbour. It consists of five spans built on piers, some of which are in the waterway. The height is 22 feet above high water level, but one of the spans, 150 feet in width, is raised by a bascule and thus affords means for the passage of vessels. The navigable channel taken from the five-fathom lines at low water is at the site of the bridge 500 feet. The adjacent land slopes more steeply to the water level on the south side than on the north. The ordinary course of navigation before there was a bridge was towards the southerly side of the waterway; the bascule span is the southernmost span of those covering the original navigable waterway. The tide runs both ways with considerable velocity, ranging from 4 to 7 knots at flood on different tides. Before the bridge was built the narrows were navigable at all stages of the tides by smaller vessels; larger vessels avoided the full strength of the larger tides, but

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otherwise were not restricted. The effect of the construction of the bridge is that, owing to the proximity of the open span to the southern shore, the space available for outgoing vessels to line up for the span is inconveniently restricted, and that all vessels are exposed to cross-currents sometimes acting only beneath the surface, which set them either away from the opening or across the bridge. The result is that it is found undesirable to navigate through the bridge except at slack water, which lasts about half an hour. Navigable hours, therefore, are confined to about two hours in the twenty-four. The difficulty of the navigation is illustrated by the collision in question. The *Eurana*, a steamship of 5689 tons gross, 400 feet in length, 56 feet beam, was proceeding outward under charge of a pilot in daylight at 6 P.M. in March, 1927. The tide was low water slack. She had straightened to pass the span, but when about 600 feet way and under slight starboard helm, her speed being about 4 knots, she took a sheer to starboard, and though engines were reversed and both anchors dropped, she collided with the central span of the bridge and suffered considerable damage to her top hamper. The trial judge found her not to blame, a decision affirmed by the President, from which there has been no appeal to this Board. The ship counterclaims against the Bridge Company on the ground that the damage was due to the bridge being an unlawful obstruction to navigation. The trial judge found that the bridge substantially increased the natural difficulties of navigation in three respects: in contracting the space in which it is necessary for ships to line up outwards, and to manœuvre after passing inwards; in adding to the uncertain conditions of tidal currents in the vicinity of the bridge, and in increasing the force of the current through the open span. The learned judge, however, found that the bridge was authorized by statute to be there in its existing form and that the shipowners had no cause of action. The learned President agreed with the trial judge as to statutory authority, and did not find it necessary to express an opinion as to the effect of the bridge on navigation, except for a statement that at the time and place in question conditions prevailed that undoubtedly made navigation through the bascule span extremely difficult. There was evidence that since the bridge was opened in November, 1925, and before the trial in November and December, 1928, several other vessels had either collided or narrowly avoided collision with the bridge.

Having regard to the facts stated above and in particular to the important circumstance not mentioned by the trial judge that owing to the construction of the bridge navigation is now confined to the periods of slack water amounting in all to only about two hours of the twenty-four, their Lordships have no doubt that it was proved that the bridge in its present form substantially interferes with navigation. Unless, therefore, the Bridge Company can establish statutory authority for erecting such a bridge, they have caused a public nuisance by obstructing the navigable highway; and the shipowners who have suffered special damage in the damage caused to their ship by the nuisance will have a cause of action against them for damages.

It is necessary, therefore, to consider the statutes and the executive orders thereunder upon which the plaintiffs rely. The Bridge Company was incorporated by a Dominion statute, 9 & 10 Edw. 7, c. 74, an Act to incorporate the Burrard Inlet Tunnel and Bridge Co. By s. 8—" The Company may lay out, construct, operate, maintain and use a tunnel under the first narrows of Burrard Inlet and a bridge over the second narrows of Burrard Inlet for foot passengers, carriages, street, railway and railway purposes with the necessary approaches from some convenient points on the south shore in or near the city of Vancouver to points on the opposite shore of Burrard Inlet so as not to interfere with navigation." The section proceeds to give powers to construct and operate lines of railway to connect with the lines of certain scheduled companies. By s. 16: " The Railway Act shall apply to the Company and its undertaking."

It is to be observed that the authority given by the special Act is to construct and maintain a bridge " so as not to interfere with navigation." Relying on the special Act alone, the Bridge Company obtain no protection for a bridge which does interfere with navigation. But the plaintiffs found themselves on the provisions of the incorporated Railway Act. Under that Act they say they have to submit their plans to the Governor in Council and to the Railway Board, who are specially charged to consider matters of navigation, and without whose authority they may not construct the bridge. The Governor in Council and the Railway Board are, it is said, the bodies designated to decide whether the bridge interferes with navigation or not, and, if they are satisfied, no further question arises. Their Lordships cannot accept that contention. The Railway Act, a general Act, contains a fasciculus of clauses under a heading "Respecting navigable waters," which contains provisions for the protection of rights of navigation. Sect. 245 contains a general prohibition against causing obstruction in or impeding free navigation of any river, water, stream or canal over which the railway is carried. By s. 47, whenever the railway is proposed to be carried over any navigable water by means of a bridge, the Board may direct with what spans or headway or opening spans the bridge shall be constructed, "as to the Board may seem expedient for the proper protection of navigation." By s. 248, when the company desires to construct a bridge over navigable waters, the company, before commencing the work, shall submit to the Minister of Public Works for approval by the Governor in Council a general plan of the site and of the works to be constructed, and after approval apply to the Board for an order authorizing the construction of the work, transmitting the approved plans and also detail plans. No deviation from the site or plans approved by the Governor in Council is to be made without the consent of the Governor in Council. The Board may alter the detail plans, and make an order for the construction of the work (sub-s. 4), and upon such order being granted the company shall be authorized to construct such work in accordance therewith; on completion the Board may grant an order authorizing the use or operation of the work. The Bridge Company from time to time made various applications for approval of their plans and for authority to construct and use the work, and obtained various orders upon which they rely. The shipping company contest the validity of these orders, alleging that the statutory requirements were not observed.

That the strict provisions of the statute were departed from is beyond question. In 1913 the Bridge Company submitted to the Governor in Council a plan for a swing bridge. This was approved, but nothing further was done. In April, 1923, the company submitted to the Governor in Council the plan of a bascule bridge and obtained approval. They then submitted this plan for approval, with detail drawings, to the Railway Board. They obtained a construction order from the Railway Board in July, 1923, but the plans of the bridge approved by such order differed from the general plan approved by the Governor in Council. The latter provided for two spans and four piers; the new plans for three spans and five piers; the length of the bridge was altered, and the position of some of the piers was substantially changed. In 1924, when a considerable part of the work was done, fears were entertained as to the effect on navigation. A board of consulting engineers was set up, and in accordance with their recommendations plans were prepared showing alterations by raising the bridge 5 feet, constructing two additional spans, making alteration in the structure of the piers, and dismantling and reconstructing part of the trestle superstructure. These plans were submitted direct to the Railway Board and a construction order obtained in March, 1925. The bridge was constructed in accordance with these plans, and it was not till August, 1925, when the work was practically complete, that the new plans were submitted for the approval of the Governor in Council. They were on this occasion not submitted by the Bridge Company on the recommendation of the Minister of Public Works under the Railway Act, but were submitted by the Vancouver Harbour Commissioners on the recommendation of the Minister of Marine and Fisheries under the Vancouver Harbour Commissioners' Act for the purpose of obtaining permission to assist the Bridge Company financially to meet the expenses of altering the bridge. In October, 1925, the Railway Board made an order authorizing the use of the bridge. The learned President was of opinion that though there might have been laxity in observing the precise directions of the statute, yet the precise order in which the Governor in Council and the Railway Board approved the plans was not of importance and the procedural defaults were waived in the final sanction of the plans of the bridge as completed. He came to the conclusion that the statutory conditions were complied with within the spirit and intent of the Railway Act. In the view their Lordships take of the case it is not necessary to express a final opinion upon this part of the case. They content themselves with saying that there is excellent authority for requiring statutory conditions to be strictly fulfilled if interference with public rights is to be justified. They must not be taken to assent to the view expressed on this part of the case in the Courts below.

But even if it be assumed that the provisions of the Railway Act were strictly observed in every particular, will the Bridge Company be protected if in fact the bridge when constructed does interfere with navigation ? In their Lordships' opinion there can be only one answer. The special Act which constitutes the Bridge Company and confers upon them the power to construct and maintain the bridge limits the power by the express condition that the bridge is not to interfere with navigation. This stipulation in favour of public rights controls the whole activities of the Company. It is absolute and it cannot be supposed that the incorporation of provisions of a general Act implied the intention of the legislature that nevertheless the bridge might interfere with navigation if the Railway Board so permitted. Their Lordships would have no difficulty in arriving at this conclusion apart from the express provisions of the Railway Act itself regulating the consequences of its incorporation with the special Act. But when those provisions are examined the conclusion is confirmed. By s. 3—"except as in this Act otherwise provided—(*a*) This Act shall be construed as incorporate with the special Act. (*b*) Where the provisions of this Act and of any special Act passed by the Parliament of Canada relate to the same subject matter the provisions of the special Act shall in so far as is necessary to give effect to such special Act be taken to override the provisions of this Act." The provisions of the special Act with which this case is concerned deal with the same subject-matter as the general Act—namely, the protection of public rights of navigation. Even if, therefore, the protection of navigation in the Railway Act is qualified by the discretion of the Railway Board, as to which their Lordships express no opinion, that qualified protection would be overridden by the absolute protection which in their Lordships' opinion was given by the special Act. It is quite a different matter when the powers of the general Act to protect the public are invoked so as to interfere with the plans of the undertaking under the special Act having no special reference to public protection. There, as has been decided by the Board, in *Canadian Pacific Ry. Co.* v. *City of Toronto* (1), the subject-matter is not the same.

Their Lordships, therefore, are of opinion that the defendants have suffered damage by reason of the construction and maintenance by the Bridge Company of a substantial interference with navigation amounting to a public nuisance for which the defendants have no statutory authority. They are of opinion that the appeal should be allowed, and that so much of the order of Maclean J. as dismissed the defendants' appeal with costs be set aside, and that so much of the judgment of Martin J., dated April 22, 1929, as dismissed the counterclaim with costs and directed that the costs of the counterclaim be set off against the costs of the action be set aside, and that in lieu thereof judgment be entered for the defendants on the counterclaim for damages to be assessed, and that the counterclaim should be remitted to the judge of the British Columbia Admiralty District. They will humbly advise His Majesty accordingly. The plaintiffs must pay the costs of the counterclaim and of the defendants' appeal to the Exchequer Court and of this appeal.

Solicitors for appellant: *William A. Crump & Son.*

Solicitors for respondents: *Berrymans.*

(1) [1911] A. C. 461.

[PRIVY COUNCIL.]

J. C.*
1931
Jan. 29.

PROPRIETARY ARTICLES TRADE ASSOCIATION AND OTHERS . . . APPELLANTS;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power—Trade Combinations—Criminal Law—Patents—Customs Duties—Regulation of Trade and Commerce—Combines Investigation Act (*R. S. Can.*, 1927, *c.* 26)—*Criminal Code* (*R. S. Can.*, 1927, *c.* 36), *s.* 498—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91, 92.

The Combines Investigation Act (R. S. Can., 1927, c. 26) by s. 36 makes it an indictable offence, punishable by fine or imprisonment, to be a party to the formation or operation of a " combine " as defined by s. 2, that is (shortly stated) a combine which is to the detriment of the public and restrains or injures trade or commerce. Inquiries whether a combine exists are to be conducted by appointed officials, who are given powers to examine books, demand returns, and summon witnesses. By ss. 29 and 30 customs duties may be reduced, and licences revoked, where the duties are used to facilitate a combine, or when the holder of a patent uses it so as unduly to limit manufacture or increase the price of any article.

The Criminal Code (R. S. Can., 1927, c. 36), s. 498, makes it an indictable offence, punishable by fine or imprisonment, to conspire, combine, or agree unduly to limit transportation facilities, restrain commerce, or lessen manufacture or competition.

Held, that s. 498 of the Code and the Act, excepting ss. 29 and 30, were intra vires the Parliament of Canada under the British North America Act, 1867, s. 91, head 27 (criminal law), and ss. 29 and 30 could be supported under s. 91, heads 3 and 22. The legislation being in its pith and substance within enumerated heads of s. 91 it was not material that it affected property and civil rights in the Provinces (s. 92, head 13), or if it affected, which it did not, the administration of justice in the Provinces (s. 92, head 14). The Dominion could employ its own executive officers to carry out legislation which was within its constitutional authority.

It was unnecessary to discuss whether the legislation was intra vires also under s. 91, head 2 (the regulation of trade and commerce), but the Judicial Committee did not assent to a contention that the power under that head was confined to the furtherance of a general power which the Dominion possessed independently of it.

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* *Present:* LORD BLANESBURGH, LORD MERRIVALE, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

Attorney-General for Ontario v. *Hamilton Street Ry. Co.* [1903] A. C. 524 followed.

In re Board of Commerce Act, 1919 [1922] 1 A. C. 191 distinguished.

Judgment of the Supreme Court of Canada [1929] S. C. R. 409 affirmed.

APPEAL (No. 118 of 1929) by special leave from a judgment of the Supreme Court of Canada (April 30, 1929) upon a reference by the Governor in Council under s. 55 of the Supreme Court Act.

The questions referred were :—

1. Is the Combines Investigation Act (R. S. Can., 1927, c. 26) ultra vires the Parliament of Canada either in whole or in part, and if so, in what particular or particulars or to what extent ? 2. Is s. 498 of the Criminal Code ultra vires the Parliament of Canada, and if so, in what particular or particulars or to what extent ?

The provisions of the above named Act are summarized in the judgment of the Judicial Committee.

Sect. 498 of the Criminal Code provides by sub-s. 1 that every one is guilty of an indictable offence, and liable to a penalty or imprisonment, who conspires, combines, agrees or arranges with any other person, or any railway, steamship, or transportation company unduly to limit transportation facilities, or restrain commerce, or unduly lessen manufacturing, or unduly prevent competition ; by sub-s. 2, the section is not to apply to combinations of workmen or employees for their own reasonable protection.

The Supreme Court of Canada answered both questions in the negative. Judgments to that effect were delivered by Duff J. (concurred in by Rinfret and Smith JJ.) and by Newcombe J. (concurred in by Mignault and Lamont JJ.). The proceedings are reported [1929] S. C. R. 409.

1930. May 29, 30; June 2, 3, 5. *Tilley K.C.* for the appellant Association; *Tilley K.C.* (with him *Frank Gahan*) for the appellant the Attorney-General for Ontario; *Hon. Geoffrey Lawrence K.C.* (with him *Maurice Alexander*)

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for the appellant the Attorney-General for Quebec. The legislation was ultra vires the Parliament of Canada, as it related to matters within the exclusive powers of the Provincial legislatures under the British North America Act, 1867, s. 91, more particularly heads 13 (property and civil rights) and 14 (administration of justice), and it did not fall within the Dominion powers under s. 91, head 27 (criminal law), or head 2 (regulation of trade and commerce) or otherwise. The legislation does not essentially differ from that which the Board held invalid in *In re Board of Commerce Act, 1919.* (1) It is invalid upon the grounds there stated, and upon a consideration of the judgments in *Toronto Electric Commissioners* v. *Snider* (2); *Attorney-General for Canada* v. *Attorney-General for Alberta* (*The Insurance Act Case*) (3); and *Attorney-General for Ontario* v. *Reciprocal Insurers.* (4) The offences created did not, in the words of *In re Board of Commerce Act, 1919* (5), " belong to the domain of criminal jurisprudence." They included acts and agreements which were not necessarily civilly unlawful: *Weidman* v. *Shragge* (6); *North Western Salt Co.* v. *Electrolytic Alkali Co.* (7); *Sorrell* v. *Smith.* (8) Further, by s. 92, heads 14 and 15, there is assigned to the Provincial legislatures a field of Provincial criminal law distinct from that of the Dominion under s. 91, head 27. That is illustrated by *Hodge* v. *The Queen* (9); *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (10); *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (11); *Canadian Pacific Wine Co.* v. *Tuley* (12); *Rex* v. *Nat Bell Liquors* (13); *Reg.* v. *Wason.* (14) Provincial legislatures have exclusive authority to interfere with civil rights by prohibiting under penalties conduct otherwise lawful. Where an act or omission is in its nature criminal or unlawful, to make it an offence does not interfere with any civil right in the Provinces; that consideration marks the distinction between the respective powers as to the criminal law.

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(1) [1922] 1 A. C. 191.
(2) [1925] A. C. 396.
(3) [1916] 1 A. C. 588.
(4) [1924] A. C. 328.
(5) [1922] 1 A. C. 191, 198, 199.
(6) (1912) 46 Can. S. C. R. 1, 33.
(7) [1914] A. C. 461, 469, 470.
(8) [1925] A. C. 700.
(9) (1883) 9 App. Cas. 117.
(10) [1896] A. C. 348.
(11) [1902] A. C. 73.
(12) [1921] 2 A. C. 417.
(13) [1922] 2 A. C. 128.
(14) (1889) 17 Ont. A. R. 22.

The legislation cannot be justified under s. 91, head 2 (the regulation of trade and commerce), for the reasons given by the Board in the *Board of Commerce Case.* (1) The effect of that judgment is that s. 92, head 2, can be invoked only in the case of legislation which falls within a power which the Dominion legislature has independently of that head. That view was again stated in *Toronto Electric Commissioners* v. *Snider.* (2)

There was no such emergency as might have justified the interference with property and civil rights under the general power to make laws for the peace, order and government of Canada: *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (3)

Rowell K.C. (with him *Varcoe*) for the respondent Attorney-General for Canada. Under the concluding paragraph of s. 91 legislation within one of its enumerated heads is not to be deemed to come within any of the heads of s. 92; Dominion legislation, including such provisions as are necessary to carry out its scheme, overrides the Provincial powers as to property and civil rights: *Attorney-General of Ontario* v. *Attorney-General for Canada* (4); *Royal Bank of Canada* v. *Larue.* (5) The legislation now in question was in its "pith and substance" (*Union Colliery Co.* v. *Bryden* (6)) within s. 92, head 27 (criminal law and procedure), and, as to ss. 29 and 30 of the Act, within head 3 (and s. 122) and head 22. Under s. 91, head 27, the Dominion Parliament can bring any act within the domain of the criminal law if it deems it in the interest of Canada to do so, and the legislation overrides Provincial legislation: *Lord's Day Alliance of Canada* v. *Attorney-General for Manitoba.* (7) In *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (8) the Board held that the words "the criminal law" in s. 91, head 27, meant the

(1) [1922] 1 A. C. 191, 198.
(2) [1925] A. C. 396, 410.
(3) [1923] A. C. 695.
(4) [1894] A. C. 189, 200, 201.
(5) [1928] A. C. 187, 198.
(6) [1899] A. C. 580, 587.
(7) [1925] A. C. 384, 394.
(8) [1903] A. C. 524.

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criminal law in its widest sense. Later decisions of the Board throw no doubt upon that view, which had already been expressed by the Supreme Court of Canada in *L'Association St. Jean-Baptiste de Montréal* v. *Brault* (1), and has since been followed in *Ouimet* v. *Bazin* (2); *Re Race-Tracks and Betting.* (3) No offence is created by s. 498 of the Code or s. 32 of the Act unless the acts or agreements are to the detriment of the public; it must be proved that they are so: *Attorney-General of Australia* v. *Adelaide Steamship Co.* (4) The Provincial power under s. 92, head 15, to impose penalties for breaches of a Provincial statute, does not limit the Dominion power under s. 91, head 27. If there is an overlapping of powers Dominion legislation would be valid even if the field were occupied, which here it was not. The Provincial statutes as to the liquor trade were held valid as local matters falling under s. 92, head 16, not as Acts dealing with civil rights.

A comparison of the legislation now in question with the two Acts considered in the *Board of Commerce Case* (5) shows that all the features which were held to be objectionable have been omitted. There is moreover an essential distinction. The former legislation was held invalid as an interference with matters assigned to the Provincial legislatures sought to be brought within the Dominon powers by ancillary provisions imposing penalties. Here the primary intention and effect is to make certain acts, when they are to the public detriment, offences; the provisions as to investigations being reasonably necessary for carrying out that primary intention. If any of those provisions are not directly within s. 91, head 27, they nevertheless are valid as being ancillary provisions to carry out the scheme of legislation: *Grand Trunk Ry. Co.* v. *Attorney-General of Canada* (6); *Attorney-General for Quebec* v. *Nipissing Central Ry. Co.* (7); *Attorney-General for Canada* v. *Attorney-General for British Columbia.* (8)

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(1) (1900) 30 Can. S. C. R. 598, 608.
(2) (1911) 46 Can. S. C. R. 502.
(3) (1921) 49 Ont. L. R. 339.
(4) [1913] A. C. 781.
(5) [1922] 1 A. C. 191.
(6) [1907] A. C. 65.
(7) [1926] A. C. 715.
(8) [1930] A. C. 111, 118.

The legislation also fell within s. 91, head 2—the regulation of trade and commerce. It is well settled that s. 91, head 2, does not enable the Dominion Parliament to interfere with a particular trade or local matter in a Province. But this was a matter affecting Canadian trade generally. The observations in the *Board of Commerce Case* (1) and in *Snider's Case* (2) were not intended to impose any further limitation on the power; the observations in the former case were explained by Newcombe J. in the judgment appealed from. (3) If the observations carry the meaning suggested for the appellants they were obiter, and contrary to the express provisions of the Act of 1867. Further, the Dominion Parliament, having power to impose tariffs, could legislate under head 2 to prevent the tariffs giving rise to combinations preventing competition and raising prices: *Wampole & Co.* v. *Karn Co.* (4); *Standard Oil Co.* v. *U. S.* (5)

Tilley K.C. replied.

1931. Jan. 29. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from the Supreme Court of Canada on a reference by the Governor in Council under s. 55 of the Supreme Court Act. The questions submitted to the Court were:—

1. Is the Combines Investigation Act, R. S. Can., 1927, c. 26, ultra vires the Parliament of Canada either in whole or in part, and if so, in what particular or particulars or to what extent?

2. Is s. 498 of the Criminal Code ultra vires the Parliament of Canada, and if so, in what particular or particulars or to what extent?

The Supreme Court answered both questions in the negative.

The appellants are the Proprietary Articles Trade Association, who had been found by a Commission appointed under the Combines Investigation Act to have been party to a combine as defined in the Act, and had been admitted to be heard on the reference under s. 55, sub-s. 4, of the Supreme Court Act. The other appellants are the Attorney-General for the Province of Quebec and the Attorney-General for the Province of Ontario. The reference involved important questions of constitutional law within the Dominion, and their Lordships have had the assistance of full and able argument in which all the numerous relevant authorities were brought to their notice. After careful consideration of the arguments and the authorities their Lordships are of opinion that the decision of the Supreme Court is right.

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(1) [1922] 1 A. C. 191, 198.
(2) [1925] A. C. 396, 410.
(3) [1929] S. C. R. 409, 421, 422.
(4) (1906) 11 Ont. L. R. 619, 628.
(5) (1911) 221 U. S. 1, 49, 50.

In determining judicially the distribution of legislative powers between the Dominion and the Provinces made by the two famous ss. 91 and 92 of the British North America Act two principles have to be observed. First, the accepted canon of construction as to the general effect of the sections must be maintained. This is that the general powers of legislation for the peace, order and good government of Canada are committed to the Dominion Parliament, though they are subject to the exclusive powers of legislation committed to the Provincial legislatures and enumerated in s. 92. But the Provincial powers are themselves qualified in respect of the classes of subjects enumerated in s. 91, as particular instances of the general powers assigned to the Dominion. Any matter coming within any of those particular classes of subjects is not to be deemed to come within the classes of matters assigned to the Provincial legislatures. This almost reproduces the express words of the sections, and this rule is well settled.

The second principle to be observed judicially was expressed by the Board in 1881, " it will be a wise course . . . . to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand" : *Citizens Insurance Co. of Canada* v. *Parsons*. (1) It was restated in 1914 : "The structure of ss. 91 and 92, and the degree to

(1) (1881) 7 App. Cas. 96, 109.

which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry": *John Deere Plow Co.* v. *Wharton.* (1) The object is as far as possible to prevent too rigid declarations of the Courts from interfering with such elasticity as is given in the written constitution.

With these two principles in mind the present task must be approached.

The claim of the Dominion is that the Combines Act and s. 498 of the Criminal Code can be supported as falling within two of the enumerated classes in s. 91—namely, "(2.) The regulation of trade and commerce," and "(27.) The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters." Reliance is also placed on "(3.) The raising of money by any mode or system of taxation," "(22.) Patents of invention and discovery," and on the general power of legislating for peace, order and good government. The appellants, on the other hand, say that the Act and the section of the Code violate the exclusive right of the Provinces under s. 92 to make laws as to "(13.) property and civil rights in the Province," and "(14.) the administration of justice in the Province."

Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value.

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(1) [1915] A. C. 330, 338.

The history of the Act and the section of the Code so far as it has been laid before their Lordships is as follows: In 1888 a select committee of the House of Commons of Canada reported upon the existence of combinations in manufacturers, trade and insurance in Canada, and that legislative action would be justified for suppressing the evils resulting from these and similar combinations and monopolies. In 1889 Parliament passed an Act for the prevention and suppression of combinations formed in restraint of trade (52 Vict. c. 41), which made it a misdemeanour punishable with fine or imprisonment to be a party to a combination as defined in the Act, for this purpose sufficiently described as in restraint of trade. One may complete the history of the section by recording that in 1892 the material section of the Act of 1889 was placed in the Criminal Code as s. 520. In 1899 the wording of the definition was varied by omitting in certain phrases the words "unduly" and "unreasonably": but in 1900 the words were restored, and the section has since stood in the Criminal Code in the form then enacted and now forms s. 498 of the Criminal Code (R. S. Can., 1927, c. 36), which is the section attacked.

To revert to the Act, in 1897 by s. 18 of the Customs Tariff Act of that year the Governor in Council was authorized to empower any judge to hold an inquiry as to whether with regard to any article of commerce there existed any combination to unduly enhance (the split infinitives are throughout the work of the legislature) the price of such article or otherwise to unduly promote the advantage of the producers at the expense of the consumers. The judge was empowered to compel the attendance of witnesses, and the production of documents. Upon his report the Governor in Council was empowered to reduce or withdraw any customs duty which facilitated such a combination. The powers conferred by this section appear to be the germ from which have sprung the more elaborate powers conferred by more recent Acts. In 1904 by the Inland Revenue Amendment Act (4 Edw. 7, c. 17), the Minister of Inland Revenue was empowered to withdraw from a manufacturer any excise licence in case of a sale or consignment by him of goods under restrictive conditions as there defined. In 1907 by the Customs Tariff Act of that year, the power of the Governor in Council to appoint a judge to inquire into the existence of combinations was enlarged: and his power to deal with any customs duty facilitating such combination was extended to cases where the existence of a combination appeared as a result of a judgment of any of the Courts. In 1910 the Combines Investigation Act (9 & 10 Edw. 7, c. 9) was passed. It made more elaborate provision for an investigation into the existence of trade combinations and provided additional remedies. It contained a definition of "combine" in very general terms. An investigation was to be ordered by a judge on application by persons interested. When ordered the investigation was to be held by a Board of three Commissioners appointed ad hoc, who were armed with large powers of obtaining evidence. Their report was to be published. If any person was reported to have been guilty of doing the acts already prohibited in s. 520 of the Criminal Code and continued so to offend after the report, he was to be guilty of an indictable offence and liable to a penalty not exceeding $1000 a day for each day the offence continued. The Governor in Council's power to reduce or withdraw customs duty was reaffirmed; and if a patent was used so as to unduly assist a combination it was made liable to revocation.

In 1919 were passed two Acts of some importance in this history, inasmuch as they have both been held by this Board to have been ultra vires the Dominion Parliament. The first is the Board of Commerce Act (9 & 10 Geo. 5, c. 37). Under this Act, a permanent Board of three Commissioners was set up which was to be a court of record. The Board might sit anywhere in Canada, and either in public or in camera. Its duties were to have charge of the general administration of the contemporaneous Act, the Combines and Fair Prices Act of 1919 (which is the second Act above referred to), and to investigate or make orders as it might be empowered by either Act, or from time to time by the special direction of the Governor in Council. It had power to make future, contingent or conditional orders, either final or interim: and its orders could be enforced by being made a rule of Court, either of the Exchequer Court or any superior Provincial Court. Any order might be reviewed and varied or rescinded by the Governor in Council: and there were provisions by which questions of jurisdiction and questions of law could be brought by way of appeal before the Supreme Court of Canada. Large powers of securing the attendance of witnesses and the production of documents were given to the Board.

The second Act of 1919, above referred to, is the Combines and Fair Prices Act (9 & 10 Geo. 5, c. 45), with the administration of which the Board of Commerce, as above constituted, was specially charged. The Act was divided into two parts, Combines and Fair Prices. A combine was defined as having only reference to such combines as thereafter defined as had, in the opinion of the Board of Commerce, operated, or were likely to operate "to the detriment of or against the interest of the public, consumers, producers, or others," and subject to such qualification was defined in terms which appear to be substantially wider than those in the Act of 1910, or in the Criminal Code, and include fixing a common price, or enhancing the price or cost of articles and lessening competition within any particular district, or generally, in production, sale or supply. The first part, dealing with combines, empowered the Board to restrain and prohibit the formation and operations of combines. For this purpose, the Board, of its own initiative, or a Commissioner, on application, could order an investigation into the existence of a combine. The Board itself held the necessary inquiry, and if of opinion that a combine existed could order the person or persons complained of to desist from the acts forming part of the operations of the combine. Disobedience constituted an indictable offence and exposed the party guilty to a penalty not exceeding $1000 a day. Whenever, in the opinion of the Board, such an offence had been committed, the Board had power to remit the record to the Attorney-General of the Province where it had been committed with a recommendation to prosecute, but no prosecution was to be commenced for such an offence or under s. 498 of the Code without the written authority of the Board. The powers of the Governor in Council to reduce customs duties and the power of the Court to revoke patents in cases of combines, were re-enacted. The second part, dealing with fair prices, was restricted to the control of necessaries of life defined in the Act as staple and ordinary articles of food, clothing and fuel, including the material of which they might in part be manufactured, and such other articles as the Board might prescribe. In respect of such articles, no person was to accumulate or withhold from sale any amount in excess of what was necessary for the consumption of his household or the ordinary purposes of his business: and any excess was to be offered for sale at prices not higher than were reasonable or just. The Board were directed to inquire into and restrain and prohibit any breach of the Act, or the making of unfair profits on necessaries of life. An unfair profit was to be deemed to be made when the Board declared that it had been made. Elaborate powers of inquiry, and of ordering statistical returns were entrusted to the Board. The Board might make declarations as to the guilt of any person concerned, and might order or prohibit the doing or omission of any act connected with the offence. Disobedience to such orders was an indictable offence, subject to a continuing penalty not exceeding $1000 a day, or to imprisonment for a term not exceeding two years. Similar provisions to those in Part I. were enacted as to prosecutions.

Their Lordships have dealt at some length with the provisions of the Acts of 1919 inasmuch as the appellants relied strongly on the judgment of the Board, in *In re Board of Commerce Act, 1919* (1), which held both Acts to be ultra vires. Unless there are material distinctions between those Acts and the present, it is plainly the duty of this Board to follow the previous decision. It is necessary therefore to contrast the provisions of the Acts of 1919 with the provisions of the Act now in dispute. The judgment above

(1) [1922] 1 A. C. 191.

referred to was given in November, 1921, and on June 13, 1923, there was passed the Combines Investigation Act, 1923 (13 & 14 Geo. 5, c. 9), which repealed the two Acts of 1919 and enacted provisions which were substantially those of the present Act. The Act of 1923 was revised in 1927 and appears substantially in the original form in the revised Act—the Combines Investigation Act (R. S. Can., 1927, c. 26). By this Act " combines " are defined as combines " which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others," and which " are mergers, trusts or monopolies so-called " or result from the acquisition by any person of any control over the business of any other person or result from any agreement which has the effect of limiting facilities for production, manufacture or transport or of fixing a common price, or enhancing the price of articles or of preventing or lessening competition in or substantially controlling production or manufacture, or " otherwise restraining or injuring trade or commerce." By the Act the Governor in Council may name a Minister of the Crown to be charged with the administration of the Act, and must appoint a registrar of the Combines Investigation Act. The registrar is charged with the duty to inquire whether a combine exists, whenever an application is made for that purpose by six persons supported by evidence, or whenever he has reason to believe that a combine exists, or whenever he is directed by the Minister so to inquire. Provision is made for holding further inquiry by Commissioners appointed from time to time; and the registrar and a commissioner are armed with large powers of examining books and papers, demanding returns, and summoning witnesses. The proceedings are to take place in private unless the Minister directs that they should be public. The registrar is to report the result of any inquiry to the Minister, and every commissioner is to report to the registrar who is to transmit the report to the Minister. Any report of a commissioner is to be made public unless the commissioner reports that public interest requires publication to be withheld, in which case the Minister has a discretion as to publicity.

By s. 32 "Every one is guilty of an indictable offence and liable to a penalty not exceeding ten thousand dollars or to two years' imprisonment, or if a corporation to a penalty not exceeding twenty-five thousand dollars, who is a party or privy to or knowingly assists in the formation or operation of a combine within the meaning of this Act. (2.) No prosecution for any offence under this section shall be commenced otherwise than at the instance of the Solicitor-General of Canada or of the Attorney-General of a Province." By subsequent sections, refusal to obey orders as to discovery and other interference with an investigation are made offences for the most part subject to summary conviction and appropriate penalties are imposed.

Under a group of ss. 29 to 31, entitled "Remedies" powers are given as in previous Acts for the Governor in Council to reduce customs duties, and for the Exchequer Court to revoke licences where the duties are used to facilitate a combine or when the holder of a patent uses it so as unduly to limit the manufacture, or enhance the price of any article. Power is given to the Minister to remit to the Attorney-General of a Province any returns made in pursuance of the Act or any report of the registrar, or any commissioner; and if no action is taken thereon by the Attorney-General of the Province, the Solicitor-General (representing the Dominion) may take the appropriate action.

In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. " Criminal law " means " the criminal law in its widest sense ": *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (1) It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality —unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of " criminal jurisprudence "; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished. Their Lordships agree with the view expressed in the judgment of Newcombe J. (2) that the passage in the judgment of the Board in the *Board of Commerce Case* (3) to which allusion has been made, was not intended as a definition. In that case their Lordships appear to have been contrasting two matters—one obviously within the line, the other obviously outside it. For this purpose it was clearly legitimate to point to matters which are such serious breaches of any accepted code of morality as to be obviously crimes when they are prohibited under penalties. The contrast is with matters

(1) [1903] A. C. 524.

(2) [1929] S. C. R. 409, 422.

(3) [1922] 1 A. C. 191, 198, 199.

which are merely attempts to interfere with Provincial rights, and are sought to be justified under the head of "criminal law" colourably and merely in aid of what is in substance an encroachment. The Board considered that the Combines and Fair Prices Act of 1919 came within the latter class, and was in substance an encroachment on the exclusive power of the Provinces to legislate on property and civil rights. The judgment of the Board arose in respect of an order under Part II. of the Act. Their Lordships pointed out five respects in which the Act was subject to criticism. It empowered the Board of Commerce to prohibit accumulations in the case of non-traders; to compel surplus articles to be sold at prices fixed by the Board; to regulate profits; to exercise their powers over articles produced for his own use by the householder himself; to inquire into individual cases without applying any principles of general application. None of these powers exists in the provisions now under discussion. There is a general definition, and a general condemnation; and if penal consequences follow, they can only follow from the determination by existing courts of an issue of fact defined in express words by the statute. The greater part of the statute is occupied in setting up and directing machinery for making preliminary inquiries whether the alleged offence has been committed. It is noteworthy that no penal consequences follow directly from a report of either commissioner or registrar that a combine exists. It is not even made evidence. The offender, if he is to be punished, must be tried on indictment, and the offence proved in due course of law. Penal consequences, no doubt, follow the breach of orders made for the discovery of evidence; but if the main object be intra vires, the enforcement of orders genuinely authorized and genuinely made to secure that object are not open to attack.

It is, however, not enough for Parliament to rely solely on the powers to legislate as to the criminal law for support of the whole Act. The remedies given under ss. 29 and 30 reducing customs duty and revoking patents have no necessary connection with the criminal law and must be justified on other grounds. Their Lordships have no doubt that they can both be supported as being reasonably ancillary to the powers given respectively under s. 91, head 3, and affirmed by s. 122, "the raising of money by any mode or system of taxation," and under s. 91, head 22, "patents of invention and discovery." It is unfortunately beyond dispute that in a country where a general protective tariff exists persons may be found to take advantage of the protection, and within its walls form combinations that may work to the public disadvantage. It is an elementary point of self-preservation that the legislature which creates the protection should arm the executive with powers of withdrawing or relaxing the protection if abused. The same reasoning applies to grants of monopolies under any system of patents.

The view that their Lordships have expressed makes it unnecessary to discuss the further ground upon which the legislation has been supported by reference to the power to legislate under s. 91, head 2, for "The regulation of trade and commerce." Their Lordships merely propose to disassociate themselves from the construction suggested in argument of a passage in the judgment in the *Board of Commerce Case* (1) under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. The words of the statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject-matter. But following the second principle noticed in the beginning of this judgment their Lordships in the present case forbear from defining the extent of that authority. They desire, however, to guard themselves from being supposed to lay down that the present legislation could not be supported on that ground.

If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and

(1) [1922] 1 A. C. 191, 198.

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civil rights in the Provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights. The same principle would apply to s. 92, head 14, "the administration of justice in the Province," even if the legislation did, as in the present case it does not, in any way interfere with the administration of justice. Nor is there any ground for suggesting that the Dominion may not employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority, as it does regularly in the case of revenue officials and other matters which need not be enumerated.

Their Lordships are of opinion that the Supreme Court of Canada were right in answering both questions in the negative, and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Solicitors for appellant Association: *Lawrence Jones & Co.*

Solicitors for appellant Attorneys-General: *Blake & Redden.*

Solicitors for respondent Attorney-General for Canada: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.*
1931
Feb. 23.

In re BENEFICES OF GREAT MASSINGHAM AND LITTLE MASSINGHAM.

APPEAL UNDER THE UNION OF BENEFICES MEASURE, 1923.

Ecclesiastical Law—Union of Benefices—Principles to be applied—Union of Benefices Measure, 1923 [14 *&* 15 *Geo.* 5, *No.* 2], *s.* 2, *sub-s.* 6.

Having regard to s. 2, sub-s. 6, of the Union of Benefices Measure, 1923, which sub-section contains the only statement in the Measure as to the principles governing the union of benefices thereunder, it is not enough, in order to justify a union, to show that one incumbent could serve the parishes affected, and that the union would save man power and might also produce surplus income available for other benefices. The circumstances and interests of the parishes themselves must be regarded.

In re Parishes of Gussage All Saints and Gussage St. Michael, Dorset (1925) 69 Sol. J. 493 followed.

Appeal allowed.

APPEAL under the Union of Benefices Measure, 1923, referred to the Judicial Committee under s. 10, sub-s. 5, of the Measure.

The appeal was against a scheme framed by the Ecclesiastical Commissioners under the Union of Benefices Measure, 1923, for the union of the benefices of Great Massingham and Little Massingham, in the diocese of Norwich.

The circumstances as to the parishes respectively, the particulars of the scheme appealed from, and the terms of s. 2, sub-s. 6, of the Measure as to the principles applicable all appear from the judgment of the Judicial Committee.

1931. Jan. 22, 23. *H. St. J. Raikes K.C.* and *H. V. A. Raikes* for the appellants.

F. H. L. Errington for the respondents, the Ecclesiastical Commissioners.

Feb. 23. The judgment of their Lordships was delivered by

LORD TOMLIN. This is an appeal to His Majesty in Council against a scheme framed by the Ecclesiastical Commissioners

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* *Present:* LORD BLANESBURGH, LORD TOMLIN, and SIR LANCELOT SANDERSON.

J. C.
1931

BENEFICES OF GREAT MASSINGHAM AND LITTLE MASSINGHAM, *In re.*

under the powers of the Union of Benefices Measure, 1923, for the union of the benefices of Great Massingham and Little Massingham, in the County of Norfolk and in the Diocese of Norwich.

The appellants are (1.) the Rector of Little Massingham, who is also the patron of the living; (2.) the Parochial Church Council of the Parish of Little Massingham; (3.) the patron of the living of Great Massingham; and (4.) a landowner who represents the tithe payers in the two parishes of Great Massingham and Little Massingham.

The parishes in question are situate in West Norfolk, some eight or nine miles to the south-west of Fakenham. The district in which they lie is sparsely populated but singularly rich in churches.

The parish of Great Massingham covers an area of 4242 acres, and contains somewhat more than 726 inhabitants. The church has sittings for 350 persons. The parsonage house is of substantial size, containing 4 living rooms and 14 bedrooms. The present incumbent has held the living since 1896. The net annual income of the living is approximately 900*l.*

The parish of Little Massingham covers an area of 2289 acres, and contains somewhat more than 235 inhabitants. The church, which is situate about a mile to the north of the church of Great Massingham, has sittings for 150 persons. The parsonage house is a large house of 18 bedrooms, in which the present incumbent carries on a boarding school. The living has been held in succession by three generations of the family of the present incumbent. He succeeded his father in 1924, and his grandfather had been his father's predecessor. The school was carried on under the present incumbent's predecessors. The net income of Little Massingham is about 540*l.*

In both churches there has been in the past ample provision of services, and in both parishes there appears to be active religious life.

In pursuance of the powers of the Union of Benefices Measure the Lord Bishop of Norwich required a body of

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four commissioners, nominated in accordance with the provisions of the Measure, to inquire into all the facts and circumstances of the two benefices relevant to the question of their union, and to report accordingly.

The commissioners held a public inquiry at Great Massingham on December 15, 1928, and subsequently presented an unanimous report making the following recommendations, that is to say: (1.) That the benefices be united. (2.) That the name of the united benefice be Great with Little Massingham. (3.) That the parishes be not united. (4.) That the Great Massingham house be the parsonage house of the united benefice. (5.) That the union take effect on the first avoidance of Little Massingham. (6.) That as regards patronage the first turn after union belong to the patron of Little Massingham, and the second and third turn to the patron of Great Massingham, and similarly in the case of every three turns thereafter. (7.) That an endowment of 1200*l.* per annum net be appropriated to the united benefice out of the endowments of the separate benefices.

The Lord Bishop of Norwich, on receiving the report, transmitted it to the Ecclesiastical Commissioners, and signified in writing his approval of the report, and thereupon the Ecclesiastical Commissioners prepared a draft scheme for the union of the benefices in question, and published the same.

The draft scheme gave effect to the recommendation of the report, except that it provided for a charge upon the endowments of the livings of 500*l.* per annum in favour of certain other benefices in the diocese of Norwich, leaving, therefore, only about 940*l.* per annum, instead of 1200*l.* per annum, as the endowment of the united benefice. It also provided for the sale of the parsonage house of Little Massingham, and for the proceeds of sale to be added to the expenses fund established pursuant to s. 32 of the Measure.

From the first the proposal to unite the benefices aroused great opposition. At the public inquiry the Rector of Great Massingham declared (and it is said with truth) that he was the only parishioner of either parish who recommended the proposed union. The opposition within the parishes has been throughout, and is practically unanimous, and the proposal has been severely criticized by a number of persons and bodies within the diocese but outside the parishes.

After the lodging of objections to the draft scheme, the Ecclesiastical Commissioners amended the draft scheme by cutting down the amount to be charged in favour of other parishes to 250*l.* per annum, and by inserting a provision to the effect that such sum as might be necessary, not exceeding 150*l.* per annum, of the income of the united benefice should be set aside for the provision of clerical or lay assistance in the performance of the duties of the united benefice.

These alterations, though perhaps not unwelcome as signs of weakness, did nothing to appease the objectors. The opposition continued undiminished, and this appeal is the result.

In their Lordships' view the case raises a question of principle. The Measure provides in s. 2, sub-s. 6, as follows: "The commissioners" (i.e., the commissioners appointed to inquire and report) "shall in making any report under this Measure have full regard to the circumstances and interests of the parishes affected by their inquiry, and it shall be the duty of each and every of the commissioners to consider the matters under inquiry in their relation to such circumstances and interests and to the interests of religion in England generally."

It is to be observed that, except so far as it is to be found in this sub-section, there is no statement in the Measure of the principles which are to govern the union of benefices. Further, it is notable (1.) that there is no power to divert to other purposes any part of the endowments of any benefice except on the occasion of a scheme of union; (2.) that where a union of benefices is proposed the question of the diversion of surplus revenue seems, under s. 15 of this Measure, to be for the consideration of the Ecclesiastical Commissioners, not as one of the factors for determining whether there shall be union, but as a point for examination after a conclusion in favour of union has been reached; and (3.) that in any case there can be no diversion of revenue except for the benefit of other benefices in the same diocese.

Now the matters to which reference has been made point, in their Lordships' judgment, to the conclusion that to justify a union it is not enough to show that one incumbent could serve the parishes affected, and that a union would therefore save man power and might also produce surplus income available for other benefices. The circumstances and interests of the parishes themselves must be regarded.

In the present case the matter stands thus. Each of the parishes concerned is a complete unit, fully equipped with all that is necessary for parochial church life, including adequate emoluments for the incumbent, nor has there been in either parish any change of circumstances calling for a readjustment of conditions. It is admitted that the union must result in a measure of loss to the parishioners, and no advantage from union can be indicated as likely to accrue to them.

Further, if the saving of man power and the diversion of surplus revenue are invoked to justify union, the amended scheme is open to two criticisms—namely: (1.) that it proceeds upon the footing that it is uncertain whether one incumbent can, unassisted, do the work of the united benefice, and (2.) that it leaves the incumbent of the united benefice with emoluments so large as to be out of scale with the normal emoluments of such an office.

In these circumstances ought union to be effected to the disadvantage and against the wishes of the parishioners?

In their Lordships' judgment the principles already indicated were recognized and applied by their Lordships' Board in *In re the Parishes of Gussage All Saints and Gussage St. Michael, Dorset* (1), and require, in the present case, a conclusion unfavourable to the scheme.

Their Lordships will accordingly report to His Majesty in Council recommending that the scheme be dismissed.

Solicitors for appellants: *Peacock & Goddard.*

Solicitors for respondents: *Milles, Jennings White & Foster.*

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(1) 69 Sol. J. 493.

[HOUSE OF LORDS.]

TOLLEY . . . . APPELLANT;

AND

J. S. FRY AND SONS, LIMITED . . . RESPONDENTS.

H. L. (E.)*
1931
March 23.

Defamation—Libel—Caricature of Amateur Golfer used as Advertisement of Goods—Whether reasonably Capable of defamatory Meaning.

The defendants, a firm of chocolate manufacturers, issued, as an advertisement of their goods, a caricature of the plaintiff, a prominent amateur golfer, depicting him as playing golf, with a packet of their chocolate protruding from his pocket, and a caddy was represented with him, who also had a packet of chocolate, the excellence of which he likened to the excellence of the plaintiff's drive. The advertisement was published without the knowledge or consent of the plaintiff, who thereupon brought an action claiming damages, alleging that it constituted a libel. By his statement of claim he alleged that " the defendants thereby meant, and were understood to mean, that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of the defendants' chocolate; that he had done so for gain and reward; that he had prostituted his reputation as an amateur golf player for advertising purposes; that he was seeking notoriety and gain by the means aforesaid; and that he had been guilty of conduct unworthy of his status as an amateur golfer."

At the trial evidence was given by golfers to the effect that if an amateur golfer lent himself to a scheme for advertising, people might think he was not maintaining his amateur status, and that he might be called upon to resign his membership of any reputable club. It appeared from correspondence passing between the defendants and their advertising agents that the question of the possible effect on the amateur status of the plaintiff and others similarly caricatured had been brought to the attention of the defendants.

Acton J. ruled that the advertisement was capable of a defamatory meaning, and left the case to the jury, who found for the plaintiff, assessing the damages at 1000*l.*

Upon an appeal by the defendants, the Court of Appeal held, first, that the judge ought to have withdrawn the case from the jury; and, secondly, that the damages were excessive, and judgment was entered for the defendants.

The plaintiff appealed on the first point only:—

Held (by Viscount Hailsham, Viscount Dunedin, Lord Buckmaster and Lord Tomlin; Lord Blanesburgh dissenting) that in the circumstances in which the publication took place, as explained by the evidence, the

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* *Present:* VISCOUNT HAILSHAM, VISCOUNT DUNEDIN, LORD BUCKMASTER LORD BLANESBURGH, and LORD TOMLIN.

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caricature was capable of bearing the meaning alleged in the innuendo, and that there ought to be a new trial limited to the assessment of damages.

Decision of the Court of Appeal [1930] 1 K. B. 467 reversed.

APPEAL from an order of the Court of Appeal (1) setting aside a verdict and judgment in an action for libel tried before Acton J. and a common jury, who returned a verdict in favour of the plaintiff and awarded him 1000*l.* damages.

The facts are stated in the report of the case before the Court of Appeal and in the opinion of Viscount Hailsham, and are summarized in the headnote.

The Court of Appeal by a majority (Greer and Slesser L.JJ.; Scrutton L.J. dissenting) held that the trial judge ought to have withdrawn the case from the jury on the ground that the document complained of as a libel was not reasonably capable of a defamatory meaning and ordered judgment to be entered for the defendants. All the Lords Justices were further of opinion that in any event there should be a new trial on the ground that the damages were excessive.

The plaintiff appealed on the first point only.

1930. Oct. 30, 31. *Rayner Goddard K.C.* (with him *H. M. Giveen* and *Lawson Campbell*) for the appellant. The substantial question is whether the trial judge was right in holding that the publication complained of was capable of bearing a defamatory meaning. The majority of the Court of Appeal held that, in the absence of evidence of special facts known to those to whom the advertisement was published causing them to attach to it the meaning alleged in the innuendo—namely, that the plaintiff had consented, either with or without reward, to being represented as assisting to advertise Fry's chocolate—the publication was incapable of bearing any defamatory meaning, and that the correspondence between the respondents and their advertising agents fell short of being evidence of facts which would entitle a special defamatory meaning to be attributed to words otherwise innocent. The fact that the caricature

(1) [1930] 1 K. B. 467.

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was published by a firm of such eminence as the respondents has an important bearing on this question, because no one would suppose that any respectable firm would have made use of the plaintiff's name to advertise their goods without his permission. If evidence of extrinsic facts is required, the correspondence between the respondents and their advertising agents, when the question of caricaturing certain well known amateur lawn tennis players was being mooted clearly shows that the respondents had present to their minds the nature of the appellant's objection. In the light of that correspondence there was ample evidence to justify the trial judge in ruling that the publication complained of was capable of being construed by reasonable men as imperilling the appellant's reputation as an amateur in the golfing world by suggesting that he had allowed his name to be used to advertise the respondents' goods. The question is not whether the publication is susceptible of an innocent interpretation, but whether no libellous construction can reasonably be put upon it; for if such a construction can reasonably be put upon it, it is for the jury to say whether or not that is the true interpretation of it, and that question should not be withheld from them: *Hart* v. *Wall* (1); *Cassidy* v. *Daily Mirror Newspapers, Ld.* (2) *Capital and Counties Bank* v. *Henty & Sons* (3) is distinguishable, because the circular complained of as a libel was not issued to the public generally but to the defendants' customers and tenants. *Dockrell* v. *Dougall* (4), where a doctor's name had been used without his authority to puff the sale of a medicine, is really an authority in the appellant's favour, because in that case the trial judge left the question whether the matter complained of was libellous to the jury, though the jury answered that question in the negative. In the Court of Appeal the only question at issue was whether the plaintiff was entitled to an injunction to restrain the unauthorized use of his name without more.

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(1) (1877) 2 C. P. D. 146, 149, 150.

(2) [1929] 2 K. B. 331, 339, 354, 355.

(3) (1882) 7 App. Cas. 741, 744, 745, 748.

(4) (1899) 80 L. T. 556.

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Norman Birkett K.C. (with him *Walter Monckton K.C.*) for the respondents. As a document the document complained of was admittedly not libellous, and it was not capable of a defamatory meaning in the absence of evidence of extrinsic facts known to persons to whom the document was published, causing those persons to attach to it the meaning alleged in the innuendo. The evidence of the distinguished golfers called on behalf of the appellant was given on the assumption that the meaning for which the appellant contended was the true meaning, and was directed to the question of damages only, and the correspondence which had been put in contained no evidence of any fact which would entitle a jury to attribute a special defamatory meaning to words otherwise innocent. It contained nothing amounting to evidence of any special facts which would justify an inference in the mind of the reader of the advertisement either that the appellant's consent to the advertisement had been obtained or that he had been paid for it. In the absence of such evidence the case ought to have been withdrawn from the jury. The appellant here was asking the jury to infer that words innocent in themselves bore some sinister meaning without giving any evidence of extrinsic facts from which that inference could reasonably be drawn. This case should be determined on the principles laid down by Lord Selborne in *Henty's* case. (1)

Rayner Goddard K.C. in reply. The important point involved in this appeal is: How far a judge is entitled to rely on his own knowledge. A judge must have regard to ordinary matters of common knowledge.

The House took time for consideration.

1931. March 23. VISCOUNT HAILSHAM. My Lords, the plaintiff in this case is a well known amateur golfer. The defendants are manufacturers of chocolate in various forms.

In the month of June, 1928, the defendants published in the Daily Sketch and Daily Mail, newspapers enjoying a large circulation in London and the provinces, a caricature

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(1) (1882) 7 App. Cas. 741, 744, 745, 748.

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of the plaintiff which represented him in golfing costume having just completed a drive, with a packet of the defendants' chocolate protruding from his pocket, in the company of a caddie, who is holding up packets of the defendants' chocolate; below the caricature was a limerick in the following terms:—

"The caddie to Tolley said, Oh, Sir,
Good shot, Sir! That ball, see it go, Sir,
My word how it flies,
Like a cartet of Frys,
They're handy, they're good, and priced low, Sir."

The caricature and the limerick were surrounded with descriptions of the merits of the defendants' chocolates, and the whole was plainly an advertisement of the defendants' goods.

The plaintiff thereupon brought this action for damages for libel. He did not complain of the caricature or the words as being defamatory in themselves; but the innuendo alleged that the "defendants meant, and were understood to mean, that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of the defendants' chocolate; that he had done so for gain and reward; that he had prostituted his reputation as an amateur golf player for advertising purposes, that he was seeking notoriety and gain by the means aforesaid; and that he had been guilty of conduct unworthy of his status as an amateur golfer."

At the conclusion of the plaintiff's case the defendants submitted that there was no case to go to the jury; the judge overruled this contention and the jury found a verdict for the plaintiff for 1000*l*. damages. From this decision the defendants appealed, asking for a new trial on the grounds that the damages were excessive, and further asking for judgment on the ground that the judge ought to have ruled that there was no case to go to the jury. The Court of Appeal came to the conclusion that the damages were excessive, and that there ought in any event to be a new trial on that ground;

but the majority of the Court further held that there was no case to leave to the jury, and accordingly directed that judgment should be entered for the defendants. From this latter decision the present appeal is brought to your Lordships' House.

My Lords, from the foregoing narrative it is plain that in order to succeed the plaintiff must satisfy the jury that the publication complained of was capable of some, at least, of the meanings attributed to it in the innuendo, and that those meanings were defamatory.

The oral evidence adduced by the plaintiff, apart from his own testimony, was that of a Mr. Storey, an eminent amateur golfer, and Mr. Hobson, a secretary of two well known golf clubs. Mr. Storey said: "If an amateur golfer lent himself to a scheme for advertising, a great many people would think he was not maintaining his amateur status. It would damage his reputation as an amateur golfer." Mr. Hobson said: "If an amateur lent himself, as a golfer, to the advertisement of people's goods, I think he would be called on to resign the membership of any reputable club." No evidence was called to contradict this testimony; and it seems to me that if the jury accepted that evidence, they were bound to reach the conclusion that, if the publication conveyed the meaning that the plaintiff had lent himself to the defendants' advertising scheme, it was defamatory. There remains, however, the question whether the publication was capable of bearing that meaning. If it was capable of such a meaning, then it seems to me that the judge was bound to leave the case to the jury. The case is unusual in that the defamatory innuendo does not depend upon the words used of the plaintiff, but solely upon the circumstances in which the publication takes place. The argument for the defendants was that there was no evidence called to prove that well known persons were in the habit of allowing their names to be used for advertising purposes, and that in the absence of such evidence a jury could not be allowed to reach the conclusion that the publication impliedly represented that the plaintiff had given such permission.

My Lords, I gravely doubt whether any such evidence was necessary. The question here does not depend upon a state of facts known only to some special class of the community, but upon the inference which would be drawn by the ordinary man or woman from the facts of the publication. It is always difficult to determine with precision the amount of judicial knowledge which is permissible to a judge or jury; but I am not satisfied that it would not be open to a jury, acting on their own knowledge as ordinary citizens, to assume that no reputable firm would have the effrontery and bad taste to take the name and reputation of a well known man for an advertisement commending their goods without first obtaining his consent. But if evidence was necessary, I think it is to be found in the correspondence between the defendants and their advertising agency, which was put in at the trial. No objection was taken either in the Courts below or at the Bar of your Lordships' House to the admissibility of this correspondence as a correct statement of the opinions of the writers. From this correspondence it appears that about six months before the date of the publication complained of the defendants had been considering the possibility of using the names of a number of well known men and women in various walks of life to commend their goods and advertise their merits. Apparently they had, from a very early date, been conscious that some of the persons with whom they were proposing to take this liberty would be likely to object, and counsel's opinion was taken as to whether each individual caricature could be regarded as libellous. The defendants expressed themselves as unwilling to allow their agents to ask the consent of the persons whose names they were proposing to use because, as they said, they felt that this was "rather bad form." Why it should be regarded as bad form to ask the consent of any individual to the use of his name in this manner, and yet unobjectionable to use his name without his consent, I am unable to understand. However, from the correspondence it appears that a number of the proposed caricatures were ruled out as being libellous, but that the caricature of the plaintiff was passed by counsel as not being in itself defamatory.

Whilst this correspondence was proceeding, there was a suggestion that Mlle. Suzanne Lenglen's caricature should be used in the course of the campaign. Mlle. Suzanne Lenglen is a well known professional lawn tennis player. Early in June, 1928, the defendants suggested that Mlle. Suzanne Lenglen should be omitted, and that either Miss Helen Wills or Miss Betty Nuthall should be substituted. Miss Wills and Miss Nuthall are well known amateur lawn tennis players. To this suggestion the defendants' advertising agents replied on June 4 in the following terms: "You return the Suzanne Lenglen lay-out with the suggestion that we should feature either Helen Wills or Betty Nuthall instead. We feel that there are several things which make this undesirable. Firstly, both Betty Nuthall and Helen Wills are amateurs, and in tennis circles even more than in golf circles the amateur status must be very carefully guarded, hence if Cyril Tolley has any quarrel with us, it is more than likely that both Helen Wills and Betty Nuthall would be upset at our caricaturing them for advertising purposes."

It seems to me that this letter is a plain intimation by the defendants' own advertising agents that the natural result of using the names of these two ladies for the purpose of the defendants' advertising campaign would be to impugn their amateur status, and that for this reason it would be undesirable to use their names, although it would be safe to use that of Mlle. Lenglen, who is a professional. This can only be on the ground that the inference which would naturally be drawn from the appearance of such an advertisement would be that the persons whose names were used had consented to their use and had consented on such terms as were inconsistent with their position as amateurs.

I think the jury were entitled to take this letter into account in determining what was the natural inference to be drawn from the publication complained of, and that there is to be found in this letter evidence entitling the jury to hold that the publication of the plaintiff's name as part of the defendants'

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advertising campaign did imply to the ordinary reader that the plaintiff had lent himself to the defendants' advertising scheme. If so, there was a case to go to the jury; both sides are agreed that the summing up was not open to criticism, and the finding in favour of the plaintiff ought not, therefore, to be disturbed.

As to the damages, there has been no appeal from the decision of the Court of Appeal that these were excessive, and that a new trial is necessary. Whether or not the new trial should be limited to the question of damages, or whether it should extend to a retrial of the whole case, is a matter of discretion. I cannot see in the facts of this case any ground for saying that the amount of the damages awarded is so excessive as to warrant the inference that the jury took a biassed or mistaken view of the whole case. The imputation against the plaintiff was a most offensive one; it was given the widest possible publicity; when the defendants were given an opportunity to apologize and to contradict the imputation that the plaintiff had consented to the use of his name, they refused to avail themselves of it; and I think that the case is one in which a jury might properly give very substantial damages. I accept the decision that 1000*l.* is too much, but unless your Lordships are prepared to hold that in every case in which excessive damages are given there must be a retrial of the whole case, I cannot see in the present case any sufficient ground for making such an order. In my opinion the new trial should be limited to the assessment of damages.

With regard to costs, the plaintiff must have the costs of the trial; in the Court of Appeal the defendants succeeded in their motion for a new trial, and in the result failed in their motion for judgment: I think each party should bear his own costs of that appeal. The plaintiff has succeeded in his appeal to your Lordships' House, and the defendants must pay the costs.

I move, your Lordships, accordingly.

VISCOUNT DUNEDIN. My Lords, the sole question raised by this appeal is whether the case ought to have been withdrawn from the jury by the judge, and judgment entered for the defendants.

It has been stated again and again and is not in dispute that the question for the judge is whether the writing or publication complained of is capable of a libellous meaning. It is for the jury, if the judge so rules, to say whether it has that meaning.

The most authoritative pronouncement on actions of this sort, because it is a judgment of this House, is to be found in the case of *Capital and Counties Bank* v. *Henty*. (1) Both parties in this case have appealed to it as an authority in their favour. My Lords, I think the ruling canon in that case is to be found in the judgment of Lord Selborne L.C. That was a case where as here the mere words used were not libellous. But Lord Selborne then proceeded to inquire what were the circumstances under which the document was published. In that case he held the circumstances did not and could not lead to any libellous imputation. The circular was directed to Henty's customers alone, and there were quite innocent reasons which would justify the circular. But he pointedly said that if the circumstances had been otherwise, if the circular had been placarded up or published to the world at large, the effect might have been quite otherwise.

Now applying this method of reasoning to the present case I find that the caricature of the plaintiff, innocent itself as a caricature, is so to speak imbedded in an advertisement. It is held out as part of an advertisement, so that its presence there gives rise to speculation as to how it got there, or in other words provokes in the mind of the public an inference as to how and why the plaintiff's picture, caricatured as it was, became associated with a commercial advertisement. The inference that is suggested is that his consent was given either gratuitously or for a consideration to its appearance. Then it is said, and evidence on that point was given, and not cross-examined to, that if that were so the status of the plaintiff as an amateur golfer would be called in question. It seems to me that all this is within the province of a jury to determine. The idea of the inference in the circumstances is not so extravagant as to compel a judge to say it was so beside the mark that no jury ought to be allowed to consider it.

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(1) 7 App. Cas. 741.

My Lords, I come to this conclusion on a consideration of the advertisement alone, explained with the evidence of the golf players and the golf secretary. There are here two separate propositions: (1.) Would the caricature associated with the advertisement admit of a reasonable inference that the plaintiff had assented to be so depicted? That depends on the view taken of the picture, of its surroundings, and of its use. (2.) If that inference were drawn would it be deleterious to the plaintiff's position as an amateur golfer, and to do him harm? That depends on the evidence of the golfers. A great deal of argument was directed to the terms of the letter of June 4, which has been quoted by his Lordship on the Woolsack. I do not consider that to be material to the question before us. It may well have influenced the jury in coming to the verdict they did, for to my mind it shows clearly that the general proposition that amateur status might be called in question by association of an amateur with an advertisement was well before the eyes of the defendants and their advisers. But we are not concerned at present with the justice of the verdict, only with the question of whether there was a case for the jury to consider.

I agree with the motion proposed.

LORD BUCKMASTER (read by LORD THANKERTON). My Lords, if the advertisement the subject of the alleged libel were issued with the assent of the appellant the evidence of Mr. Storey and Mr. Hobson shows that such conduct would seriously injure his position in golf clubs and as an amateur golfer. This evidence was not made the subject of challenge by cross-examination nor of dispute by rival evidence, and indeed is in agreement with common experience.

The whole question therefore is whether the advertisement itself is capable of the inference that such assent either voluntary or for reward had been obtained before its publication.

Upon the face of it there is no statement to that effect, and evidence to show that such was the reasonable inference was I think rightly rejected, for if admitted on one side evidence to contradict it must equally have been admitted on the other. The question therefore is whether the judge was bound to say that the publication was incapable of this meaning. I do not think that he was. All the circumstances of its issue must be considered, and the first is that the picture is not a mere caricature, it is an advertisement; and it seems to me the question of whether a well known and respectable trader would be assumed to have the effrontery to use a man's portrait and his reputation to advertise goods without his assent is exactly the class of question on which the opinion of a jury might well be invoked. If one man calls another a thief without more it might be mere vulgar abuse and not actionable, but if there are circumstances from which it might properly be inferred that, goods having been stolen, the man of whom the words were spoken was pointed to as the thief, the words at once become actionable, and it would be open to the jury to consider whether in the circumstances that was their true meaning.

In this case there is also some further help to be obtained from letters that passed between the defendants and the advertising agents. The letter referred to by Scrutton L.J. of June 4, 1928, is certainly very significant. There had been a suggestion made that Miss Helen Wills or Miss Betty Nuthall should be substituted for an advertisement of which Miss Lenglen was the principal figure. The agency points out that this is very undersirable for the following reasons: "Firstly, both Betty Nuthall and Helen Wills are amateurs and in tennis circles even more than in golf circles the amateur status must be very carefully guarded, hence if Cyril Tolley has any quarrel with us it is more likely that both Helen Wills and Betty Nuthall would be upset at our caricaturing them for advertising purposes." It is impossible to read this letter without realizing that the advertising agency were well aware that such advertisement might affect the amateur status of people both in golf and in tennis circles, and it is obvious that this can only happen if the advertisement suggested that the persons caricatured had assented to its publication. It is also worthy of notice that in the letter of the plaintiff's solicitors of March 14, 1929, after the proceedings had been started, an offer was made in the following terms: "That if your clients will publish, in the same newspapers as the advertisement complained of appeared, a statement that such advertisement was inserted without Mr. Tolley's knowledge or assent, and that he, Mr. Tolley, received no payment directly or indirectly for the use of his name, our client will then be prepared to agree to an order staying proceedings, the defendants paying the taxed costs up to date."

To which the solicitors for the respondents replied offering a limited publication of a statement to the effect that the plaintiff had received no remuneration and adding that no one could think that remuneration had been paid. But they made no reference whatever to the suggestion that they should say the advertisement was without Mr. Tolley's knowledge or assent. The plaintiff's solicitors again wrote on May 14, and referred only to the question of remuneration, but their first letter was explicit, and the refusal to accept the statement lent strong colour to the suggestion that the publication in itself suggested assent, and that the defendants were not particularly willing to let the world know that such assent had not been obtained. The evidence to which I have referred does not depend upon the receipt of money, but on the fact that an amateur had lent himself to the advertisement of other people's goods. I think, therefore, there was sufficient for the jury to consider, and if that be so, their verdict, excepting as to amount, is unassailable. Upon this latter point the Court of Appeal have held that the damages are so unreasonable that on this ground alone a new trial is justified. This conclusion has not been made the subject of appeal, and upon that head, therefore, the new trial must be held, though I do not think it right that it should be assumed that the damages ought to be nominal or trivial. Substantial wrong has been done to the plaintiff and not one which is technical and insignificant.

LORD BLANESBURGH (read by LORD RUSSELL OF KILLOWEN). My Lords, in this case, with no sympathy whatever for the respondents in the predicament in which they have become involved, I agree with Greer and Slesser L.JJ. The appellant, in my judgment, failed at the trial to bring home to the respondents any actionable wrong. He made no case against them fit for the consideration of the jury. At the close of the evidence it had become apparent, as it seems to me, that the only reputation blunted by the publication of this caricature was that of the respondents responsible for it.

The appellant in his evidence stated that he did not find anything offensive in the picture. Presumably that was his impression all along. It surprises me, but it suggests a sufficient explanation for these proceedings. Just because the appellant deemed the caricature inoffensive, so also might he suppose that the golfing world when they saw it would be tempted to conclude that he had consented to it, if no more. Hence this action.

The respondents' advisers must have been strongly tempted to challenge at the trial this charitable view of their clients' work. Challenge was so easy. But of course there were difficulties in their way and the forensic temptation was resisted. They did not contest the appellant's view of their clients' advertisement. But nevertheless that view was, I am convinced, profoundly mistaken. Scrutton L.J.'s description of this thing is surely not a whit too severe. The caricature is a piece of offensive vulgarity—so vulgar indeed —and this is to my mind the fatal obstacle to the appellant's success in these proceedings—that it is almost beyond reason that any one knowing anything of the appellant, as he and his record were disclosed at the trial, could for a moment have supposed or even suspected that he had had anything whatever to do with its publication. That publication was, surely, only another instance of the toll levied on distinction for the delectation of vulgarity.

And if the appellant's dissociation from the publication was thus apparently complete, and no witness was called to contest that view or to affirm the contrary, then the appellant's case as presented by him is at an end. For it is admitted that the caricature, vulgar though it be, is not in itself actionable. Had its subject been a distinguished statesman it seems to be agreed that it would have remained innocent. So, I suppose, if a great scientist or a scholar or a captain of industry had been enlisted, in like manner, into the service of chocolate. But it is, so it is suggested, defamatory of the appellant because he is a prominent amateur golfer. Upon him the caricature is a serious libel actionable as such. One naturally asks why. It seems anomalous that for some hidden reason it should be defamatory of a man in that character, while it would have remained legally harmless at the instance of these other persons not less well known and eminent. And the question is searching, because it has met with what I cannot help thinking is a somewhat confused answer. It is defamatory of the appellant, so it is said, because it is a publication calculated to imperil his amateur status. Again one asks why—and the answer is because it imports that he consented to its publication or was paid to allow it—and expert evidence is called to show that if such had been the fact he would have forfeited his amateur position and might have been required to resign from the golf clubs to which he belongs. The answer seems inconclusive, if not irrelevant. The fact that the consequences to an amateur golfer would have been so immediate and serious seems to supply a convincing reason why consent to such a publication should of all men not be imputed to him. And if the expert evidence was called for the purpose of quantifying damage, how irrelevant it was to the case then being presented by the appellant. Why, he actually appeared before the jury as the amateur golf champion in the year succeeding the publication of the caricature. And, further, is it not obvious that no action in relation to his amateur status could have been taken against the appellant before his conduct in relation to this publication had been challenged by some responsible authority? That it never was so challenged I assume. There was no reference at the trial to anything of the kind. But if it had been and if in answer he had declared, as I doubt not he would in terms appropriately indignant have declared, that not only had he never consented or been asked to consent to the publication, but that on the contrary he strongly resented the liberties taken with his name and personality, then there could have been no end to the challenge except an apology for having made it. As it seems to me, therefore, on the only case presented by the appellant, the caricature being per se not actionable, there was nothing left for the jury to consider.

But, my Lords, when I find that the jury awarded the appellant 1000*l*. damages, when there was, so far as I can see, no evidence, on the case presented, properly to instruct any damages at all, the conclusion is inevitable that if the jury were not merely venting their displeasure upon the respondents they were considering and adjudicating upon a very different case, not suggested even in the plaintiff's evidence and in no way proved. And that case was, as I followed learned counsel, really implicit in his argument at your Lordships' Bar. It may perhaps thus be stated.

There is a widespread belief, well or ill founded, that amongst some gentlemen cricketers, amateur lawn tennis players, and other amateur athletes, including golfers, a practice obtains to utilize and exploit their amateur status for reward by, for example, assisting advertisement campaigns or pushing by the use of their name and personality the sale of proprietary articles, and that the respondents' caricature was such as falsely to represent to the public that the appellant was one of these athletes whose amateur status is believed to be a mere masquerade.

Now, I cannot doubt that such an allegation, if made and proved, would have amounted to a serious imputation on the honour of the appellant, and, not being justified, might well have instructed exemplary damages.

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But there is nothing in the caricature itself to suggest all that or any of it. In the old days an averment that the libel was published to people who knew of that belief would have been essential. The Legislature has rendered it no longer necessary to set out on the record the facts and the colloquium necessary to support an innuendo: they are now only matter of proof at the trial; but the principle remains: see per Lord Blackburn, *River Wear Commissioners* v. *Adamson* (1); and see also *Capital and Counties Bank* v. *Henty*. (2) My Lords, there was no evidence at all adduced on this subject. None is supplied, as I read it, by the correspondence to which reference has been made. The appellant himself was the obvious witness on such a topic, and, while one may respect his reticence upon a matter so delicate, the gratification of a quite natural reserve is not to be purchased at the respondents' expense. Had evidence on the subject been tendered, the limits of this alleged belief might through cross-examination have been set. Did it get as far as a vulgar caricature like this; did it go beyond a letter or a photograph, signed perhaps, and in point of attractiveness not more truthful than was necessary? In this matter were amateur golfers ever even suspect? It would have been interesting to ascertain the limits of the alleged belief.

But neither the belief nor its limits were explored or made the subject-matter of evidence; and I have, I think, said enough to show that neither could have been within the judicial knowledge of the judge or within the worldly experience of a Middlesex common jury.

If therefore this was the real case on which the jury adjudicated, such a case was entirely beyond their competence. There was no evidence upon it fit for submission to them for consideration or at all, and I reach from this approach also the conclusion that the respondents were entitled to judgment.

I would dismiss the appeal.

Lord Tomlin. My Lords, the only question in this appeal

(1) (1877) 2 App. Cas. 743, 763. (2) 7 App. Cas. 741, 771, 778.

is whether the learned trial judge was wrong in allowing the case to go to the jury.

The law is not in doubt. It is for the judge to determine whether the writing or picture complained of is capable of a defamatory meaning, and in this connection it is to be observed that that which is prima facie innocent may become capable of a defamatory meaning by reason of the circumstances surrounding its publication.

If the judge determines that the writing or picture is capable of a defamatory meaning it is for the jury to say whether it is in fact defamatory.

Here the thing complained of is a drawing in the nature of a caricature of the appellant, a well-known amateur golfer, with some added letterpress and other features establishing the identity of the person represented.

Regarded in vacuo it is admittedly innocent, but the question remains whether it is capable of a defamatory meaning by reason of the circumstances surrounding its publication.

It has been published by the respondents, a commercial company, as part of an advertisement used for promoting the sale of their goods.

Having regard to the evidence (apart altogether from the correspondence between the respondents and their advertising agents) it is not in my opinion possible to say that the matter complained of in the circumstances of this case, and in the environment in which it appeared, might not have given rise in reasonable minds to the inference that the appellant had assented to this publication. Further there was evidence that such an inference might be harmful to the appellant in view of his position as an amateur golfer.

My Lords, upon this view of the matter I think the trial judge was right in not withholding the case from the jury and I agree with the motion proposed.

Order of the Court of Appeal reversed; and further ordered that judgment be entered for the appellant for damages to be assessed, and *that a new trial be had between the parties for the assessment of such damages The respondents to pay the costs of the trial before Acton J. and also the costs of the appeal to this House. Each party to bear and pay their own costs in the Court of Appeal. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.*

Lords' Journals, March 23, 1931.

Solicitors for the appellant: *Cohen & Cohen.*

Solicitors for the respondents: *Pritchard, Englefield & Co., for Osborne, Ward, Vassall, Abbot & Co., Bristol.*

[HOUSE OF LORDS.]

H. L. (Sc.)*
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FISHER OR SIMPSON (NOW JOHNSTON) (PAUPER) . . . . APPELLANT;

AND

LONDON, MIDLAND AND SCOTTISH RAILWAY COMPANY . . . . . RESPONDENTS.

Workmen's Compensation—Arising out of Employment—Unexplained Death—Railway Guard falling from Train in the Course of his Employment while travelling to his Work—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-s.* 1.

Per Lord Tomlin: The rule to be deduced from the authorities for application to unexplained accident cases is that where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches, and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk, and to hold that the accident arose out of the employment, but the inference as to the origin of the accident may be displaced by evidence tending to show that the accident was due to some action of the workman outside the scope of his employment.

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* *Present:* VISCOUNT DUNEDIN, LORD TOMLIN, and LORD THANKERTON.

A railway guard, instructed to travel from Glasgow to Gourock in order to take charge of a train there, got into an empty compartment at Glasgow. On arrival of the train at Gourock he was missing, but articles belonging to the man were found on the seat of the compartment. He was afterwards found lying unconscious in a tunnel between Glasgow and Gourock at the left side of the direction of the train, and he died from a fractured skull without recovering consciousness. The compartment at Gourock had its left door shut but the window open. Upon a claim by his dependants for compensation, the arbitrator negatived violence and suicide, and found that the man met his death by falling accidentally from the window of the compartment, and on these facts he concluded that the accident arose out of and in the course of the deceased's employment and awarded compensation:—

Held, that the arbitrator was entitled on the facts found to draw the inference that the accident to the deceased arose out of as well as in the course of his employment.

Mackinnon v. *Miller* [1909] S. C. 373, approved by the House of Lords in *Kerr* or *Lendrum* v. *Ayr Steam Shipping Co.* [1915] A. C. 217, followed.

Kerr or *Lendrum* v. *Ayr Steam Shipping Co.* [1915] A. C. 217 preferred to *Marshall* v. *S.S. Wild Rose* [1910] A. C. 486, unless distinguishable.

Decision of the First Division of the Court of Session in Scotland [1930] S. C. 166 reversed.

Appeal from an interlocutor of the First Division of the Court of Session in Scotland (the Lord President, Lord Sands, Lord Blackburn, and Lord Morison) (1), reversing a determination of the Sheriff-Substitute of Renfrew and Bute on a case stated under the Workmen's Compensation Act, 1925.

The facts are stated in the opinion of Viscount Dunedin, and are summarized in the headnote.

The stated case is set out in full in the report in the Session Cases.

1930. Nov. 28; Dec. 1, 2. *A. P. Duffes K.C.* (of the Scottish and also of the English Bar) (with him *G. R. Thomson* (of the Scottish Bar) and *A. Aiken Watson* (of the English Bar)) for the appellant. The arbitrator having negatived violence and suicide, the only reasonable explanation of the fatality was that the deceased met his death by accident by falling out of the train, and, it being admitted that the deceased was travelling in the train in the course of his

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(1) 1930 S. C. 166.

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employment, the arbitrator was entitled to infer from the facts found in the case, in the absence of any suggestion that the deceased deviated from the course of his employment, that he met his death by accident arising out of his employment: *Mackinnon* v. *Miller* (1); and see *A. G. Moore & Co.* v. *Barkey.* (2) If the deceased met his death by reason of a risk to which his employment exposed him, the fact that the risk is one which is shared by other railway passengers is immaterial: *Dennis* v. *A. J. White & Co.* (3); *Thom or Simpson* v. *Sinclair.* (4) The First Division of the Court of Session have usurped the functions of the arbitrator. It is settled law that the conclusion which the arbitrator has come to cannot be disturbed unless it is one which no reasonable man could reach: *John Watson, Ld.* v. *Brown* (5); *Garrallan Coal Co.* v. *Anderson* or *Devlin.* (6) *Mackinnon* v. *Miller* (1) was not cited in *Marshall* v. *S.S. Wild Rose* (7), where the facts were very similar. In that case the majority of your Lordships seemed to suggest that it was necessary to prove not merely that the seaman was on the ship at the time of the accident, but that his presence there was associated with some particular duty. That was put aside by the majority of your Lordships in *Kerr* or *Lendrum* v. *Ayr Steam Shipping Co.* (8), and *Mackinnon* v. *Miller* (1) was approved. Lord Dunedin differed in *Lendrum's* case, but only on the ground that the case was ruled by *Marshall* v. *S.S. Wild Rose.* (7) This case is completely covered by *Mackinnon* v. *Miller* (1), which has been accepted by your Lordships' House.

[He also referred to *S.S. Swansea Vale* v. *Rice* (9); *Moore* v. *Manchester Liners* (10); *Kitchenham* v. *S.S. Johannesburg* (11); *O'Brien* v. *Star Line Ld.* (12); *McDonald* v. *S.S. Banana* (13);

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(1) 1909 S. C. 373.

(2) [1923] A. C. 790, 795; 1923 S. C. (H. L.) 101, 103.

(3) [1917] A. C. 479, 482, 483, 484, 489, 491.

(4) [1917] A. C. 127, 134, 137.

(5) 1925 S. L. T. 569; 18 B. W. C. C. 419, 426.

(6) [1927] A. C. 59, 69; 1926 S. C. (H. L.) 69, 73.

(7) [1910] A. C. 486.

(8) [1915] A. C. 217, 222, 239; 1914 S. C. (H. L.) 91, 103.

(9) [1912] A. C. 238.

(10) [1910] A. C. 498.

(11) [1911] A. C. 417.

(12) 1908 S. C. 1258.

(13) [1908] 2 K. B. 926.

Reed v. *Great Western Ry. Co.* (1); *Jackson* v. *General Steam Fishing Co.* (2); *Davidson* (*Charles R.*) *& Co.* v. *M'Robb* or *Officer* (3); *Evans* (*Richard*) *& Co.* v. *Astley.* (4)]

Douglas Jamieson K.C. (of the Scottish Bar) (with him *J. L. Clyde* (of the Scottish Bar) and *Bertram Reece* (of the English Bar)) for the respondents. The claimant must prove two things—namely, that the death was caused by an accident arising: (1.) in the course of and (2.) out of the employment. Here no one knows how the accident was caused, and no one knows therefore out of what it arose. It is all matter of conjecture. If the known facts are equally consistent with either alternative—namely, that the accident has, or that it has not, arisen out of the employment—there is no room for an inference either way, and the claimant has not discharged the onus laid upon him: per Lord Atkinson in *Marshall* v. *S.S. Wild Rose* (5) and in *Kerr* or *Lendrum* v. *Ayr Steam Shipping Co.* (6) There is no difference between those two decisions as to the law governing cases of an unexplained death; the only difference was as to the proper inference to be drawn from the facts. Upon the facts here found there was no reasonable ground for the arbitrator drawing the inference that the accident arose out of the deceased's employment.

[He also referred to *Pomfret* v. *Lancashire and Yorkshire Ry. Co.* (7); *Lynch* v. *Crown Steamship Co.* (8); *S.S. Serbino* v. *Proctor.* (9)]

A. P. Duffes K.C. replied.

The House took time for consideration.

1931. Feb. 13. VISCOUNT DUNEDIN. My Lords, this is a case arising under the Workmen's Compensation Acts. The Sheriff-Substitute, as arbitrator, stated a special case to the First Division of the Court of Session. The Sheriff set forth the case in a series of thirty-seven findings. I do not think it is necessary to recite them in full, because the facts set

(1) [1909] A. C. 31.
(2) [1909] A. C. 523; 1909 S. C. (H. L.) 37.
(3) [1918] A. C. 304.
(4) [1911] A. C. 674.
(5) [1910] A. C. 486, 491.
(6) [1915] A. C. 217, 226, 227.
(7) [1903] 2 K. B. 718, 726.
(8) 1916 S. C. 695.
(9) [1916] 1 A. C. 464.

forth in most of them can be put, for the purposes of your Lordships' judgment, much more briefly in a narrative form.

Joseph Simpson was a railway guard in the employment of the respondents. He was instructed to travel from the Central Station, Glasgow, by the 9.3 A.M. train to Gourock on September 17, 1928, in order to take charge of a train from Gourock to Glasgow. He got into a third-class compartment in that train, and no one else was in the compartment. The train stopped at Bishopton and Langbank and proceeded on to Gourock. On arrival at Gourock he was missing, but various articles belonging to him were found on the seat of the compartment. Between Bishopton and Langbank there is a tunnel. At about noon his body was found lying in the tunnel at the left side of the direction of the train. He was unconscious when found, and never recovered consciousness till he died, and the cause of death was a lacerated wound on the base of the skull such as would have been caused by a fall from the train, it being found that the skull was fractured. The compartment in which he was had, at Gourock, on its left side the door shut but the window open, and the hinge of the door was towards the direction in which the train was travelling.

So far, a summary. I now give the particular findings at the end: "That no facts were proved showing or tending to show that the deceased was a victim of violence or that he committed suicide; that no further facts or circumstances were proved showing or tending to show that the fastenings of the door were insecure or were interfered with by the deceased, or that the deceased opened or attempted to open, or shut or attempted to shut, the door, or leaned out of the carriage, or in any way failed to behave as a railway passenger ought, or that the door opened accidentally; that he was a steady man of cheerful disposition, with no domestic or financial worries; that it is possible to fall from the window of a train by pure accident; that it is not known what the deceased was doing at the time of, and immediately prior to, the accident; that, so far as appears, the deceased was immediately prior to his death proceeding in course of his employment, and that the manner in which he was killed was consistent with his continuing in that employment; and that he met his death by falling accidentally through the window of the compartment in which he was travelling as aforesaid.

"On these facts I formed the opinion that the accident arose out of and in the course of the deceased's employment, and that the respondent [the present appellant] as an individual and as tutrix and administratrix in law of her pupil children is entitled to compensation under the Workmen's Compensation Act, 1925, in respect of the death of the said Joseph Simpson."

The question put was whether the Sheriff was entitled so to find. The First Division answered the question in the negative, being of opinion that nothing was actually known as to how he fell out of the carriage, and that being so, the onus on the appellants, his widow and children, was not discharged.

First, let me say a few words about the facts. The crucial fact is that he obviously fell out of the carriage. The arbitrator did not, I think, need to find more than that. It was not, I think, necessary to decide between the window and the door as his place of exit. The door might easily have been insecurely fastened and have swung open, and in going to shut it he might have fallen out, and the draught in the tunnel might have been enough to cause the door to slam and remain shut, it being fitted with the class of lock that allows a slam to shut it. The arbitrator has preferred the exit by the window.

Lord Sands, whose judgments I so generally admire, seeks to criticize this finding by a reductio ad absurdum, and says that doubtless the window was large enough to let him through, but adds that this is as indisputable a proposition as that a hunted fox might leap through a window in a moving train. With deference to his Lordship, he leaves out the question of proved facts. If it had been proved that a pack in full cry was seen running towards an approaching train which was going slowly, and if, on arrival at Gourock, a fox had been found by itself in a third-class compartment without a ticket, I think that the inference that the fox had gone through the window would be inevitable. Here the man is in the compartment. He must have made his exit by the window or the door. I am not embarrassed by the choice, because there is nothing in either mode of exit that is incompatible with accidental exit.

The learned Lord President in his judgment says that he has had great difficulty in this case, a difficulty not dispelled by a copious citation of authority. I am not surprised at either statement. The case is a narrow and difficult one, and when a mass of cases decided under Workmen's Compensation statutes are cited, they may easily seem, in contrast, not only difficult, but contradictory. One thing, however, I am clear about. It is no use trying to decide a case simply by looking at decided cases and then inquiring which case most resembles the present on the facts. Decided cases are only useful so far as they lay down principles, and then, to quote what I said myself in a case which I fear I shall often have to refer to (*Mackinnon* v. *Miller* (1)), " each case must be dealt with and decided on its own circumstances, and inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony."

Your Lordships had the advantage of a very full and able argument in this case. I have examined every case cited by learned counsel, and I have looked at many more. The conclusion I have come to is that there is to be found in the cases what I may call two opposing tendencies of construction, and I think that this case depends on which of the two opposing tendencies commends itself to your Lordships. To mention names, I think it will certainly be found that the protagonist of one tendency is Lord Loreburn and of the other Lord Atkinson. But a decision cannot be rested on the question of names. It must rest on which shall be found most securely to be based on the actual decisions of this House.

I may begin with stating two propositions, as to which there is now no controversy. The first is that the questions of " arising out of the employment " and " in the course of the employment " are two separate questions, and must both, as well as the fact that there was an accident, be made good

(1) 1909 S. C. 373.

by the claimant. The second is that the finding of an arbitrator cannot be set aside unless it is either wrong in law or, if it is a finding in fact, is such as a reasonable man ought not to come to. Now, in the vast majority of cases there is convincing testimony as to how the accident happened, and the controversy arises on the application of the phrases of the Act to the facts known. For the purposes of this case these cases may be generally put aside. The only cases that are really in point are those in which it is not positively known exactly what happened.

Turning to that class of case, I will go at once to the often cited case, *Mackinnon* v. *Miller*. (1) If it stood by itself it would not be to your Lordships a binding authority, but it has been several times considered in this House, and it will, I think, be the best starting point for showing how what I have called the two tendencies develop. The facts were these: Miller was an engineer employed on a steam tug. The tug was moored to a barge, which was moored to a jetty in the harbour of Kinlochleven. Miller was seen in his bunk by others of the crew at 5 A.M. At 6 A.M. he had disappeared, leaving his working clothes beside his bed. A few days afterwards his body, clad in his night dress, was found in the water close to where the tug had been lying. The arbitrator, finding the above facts, added that he was of a cheerful disposition and happy in his home life, and that he could not swim. He then found (1.) that he did not commit suicide; (2.) that he died by accident arising out of and in the course of his employment. The question put in the special case was whether the Sheriff was entitled to make the findings he did. The answer given by the First Division of the Court of Session was that he was so entitled. Now, my judgment in that case embodied several propositions which I will state separately, because they have all been subjects of canvass.

The first proposition was that which I have already stated, that the finding of the arbitrator must not be recalled unless it either can be said to be due to an error in law, or if, in so far as based on fact, it was a finding to which no reasonable man ought to come. I need not say more on this head, because I think now no one contends that that is wrong.

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(1) 1909 S. C. 373.

The second proposition was that the proof incumbent on the applicant could be furnished by circumstantial evidence just as well as by direct testimony. I pointed out that there was no such thing as absolute certainty even when there was direct testimony, so that, if analysed strictly, any conclusion is one based on the balance of probabilities. I shall have more to say on this in regard to the question of the negation of suicide, but in the meantime I wish to go on to show the facts of the whole case.

The third proposition was that if the arbitrator, having on the balance of probabilities negatived violence and suicide, and considering the circumstances that the man was in a place where his employment compelled him to be, which place had an element of danger sufficient to account for the death, drew the inference that the death was an accident arising out of and in the course of employment, that was an inference that could not be set aside merely because the evidence was merely circumstantial, and certainly as to how the accident actually happened was unattainable. That proposition was tersely expressed by Lord Kinnear in his judgment in the same case. It contains the sub-proposition that a man may be in the course of his employment though he is not at the moment actually working. Lord Kinnear said (1): "It has been decided in many cases that it is not necessary, in order to bring the case within the scheme of the Act, to show that at the moment at which the accident happened he was engaged in some particular duty, if the accident happened while he was in the ordinary course of his employment, and while he was on premises where his employment required him to be."

No appeal was taken against that decision.

Next year the case of *Marshall* v. *Owners of the Wild Rose* came before your Lordships' House. (2) The facts of that case were as follows:—

Marshall was an engineer employed on board a trawler, the *Wild Rose*. The *Wild Rose* was moored in Aberdeen Harbour. Marshall, after being on shore, returned to the ship at 10 P.M. Steam had to be got up by midnight. He went below and took off his clothes except his trousers, shirt, and socks. The night was hot. He came up on deck and remarked to the chief engineer that he was going up for a breath of air. He was missed at midnight. Next morning his body was found in the water just under the place where the crew had the habit of sitting on the rail or bulwark. The arbitrator found that he was accidentally drowned, and that the accident arose out of and in the course of his employment. The Court of Appeal, following their own judgment in the case of *Bender* v. *S.S. Zent* (1), where the circumstances were absolutely similar, recalled the decision of the arbitrator and held that there were no circumstances which allowed him to draw the inference he did. Appeal was taken to this House, and the case was argued before Lord Loreburn L.C., Lord James of Hereford, Lords Atkinson, Shaw, and Mersey. The judgment of the Court of Appeal was confirmed by a majority, the Lord Chancellor and Lord James of Hereford dissenting. It will be seen at once that it was desperately difficult, if not impossible, to reconcile this judgment with our judgment in *Mackinnon* v. *Miller* (2), but the terms of Lord Loreburn's dissent are very important in view of what happened after. All the judges of the Court of Appeal had held, and all the noble Lords agreed with them, that the man was in the course of his employment. In other words, they agreed with what I have called the sub-proposition of the third proposition in *Mackinnon's* case. And then Lord Loreburn (3) quoted Farwell L.J.'s judgment, who had said that "If an ordinary sailor is a member of the watch and is on duty during the night and disappears, the inference might fairly be drawn that he died from an accident arising out of his employment; but if, on the other hand, he was not a member of the watch, and was down below, and came up on deck when he was not required for the purpose of any duty to be performed on deck, and disappeared without our knowing anything else, it seems to me there is absolutely nothing from which any Court could draw the inference that he died from an accident arising out of his employment." Having made that quotation, Lord Loreburn goes on as follows: "Now, I am not able to take that distinction. The employment being to be on board, I cannot see that an unexplained accident must arise out of the employment if it happen while he is on an active part of his occupation, and cannot so arise if he is for the time being at leisure. In either case you have first to ascertain if the man went overboard by accident as best you can, the difficulty of so ascertaining being equal whether he was on watch or not. And if he did fall overboard by accident, it equally arose out of his employment whether it occurred during that part of the voyage when he was actually working or that part when he was resting from his work. The employment, by the very nature of it, exposes him to certain dangers whether at work or not, one of which is falling or being washed off his ship. And if in the course of that employment the man being on the ship accidentally perishes by one of those dangers, I do think the accident arises out of the employment."

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(1) 1909 S. C. 383.

(2) [1910] A. C. 486.

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(1) [1909] 2 K. B. 41.
(2) 1909 S. C. 373.
(3) [1910] A. C. 486, 488.

Now, Lord Atkinson, who delivered the leading judgment for the majority, put in the forefront of his speech the case of *Wakelin* v. *London and South Western Ry. Co.* (1) That was a case at common law where the representatives of a railway servant, who had been killed by a passing train at a level crossing, sued the railway company under Lord Campbell's Act. There being no available evidence as to how the accident really happened, it was held that the plaintiffs had not made out their case. I venture to think that the criterion in such a case is somewhat different from the criterion in Workmen's Compensation cases. There, to succeed, the plaintiff had to establish negligence against the defendant corporation. But under the Workmen's Compensation Act the point to be established has nothing to do with negligence. I may be wrong as to this, but at any rate I am not alone in my view. Lord Haldane, in *Thom* or *Simpson* v. *Sinclair* (2) said,

(1) (1886) 12 App. Cas. 41.

(2) [1917] A. C. 127, 135.

speaking of Workmen's Compensation cases: "I think that the Court is directed to look at what has happened proximately, and not to search for causes or conditions lying behind, as would be the case if negligence on the part of the employer had to be established." But it matters not. There was ample ground for Lord Atkinson's judgment without the case of *Wakelin*. Only I think his views as to *Wakelin* tinged his method of approach to other questions. He took the same view as the Court of Appeal, that where there was complete ignorance as to how the accident happened the case could not be said to be proved.

Now, after the decision of this case I do not hesitate to say that any counsel who had to advise would have said that the matter was now settled and that our judgment in the First Division in *Mackinnon* v. *Miller* (1) was inferentially overruled. *Mackinnon's* case had not been cited in the discussion, and probably the noble Lords were quite unaware of it. But it was not so to be. In 1912 came up the case of *Swansea Vale* v. *Rice*. (2) In this case a sailor had to be on watch from 4 A.M. to 8 A.M. He was seen on the bridge at 7 A.M. and never afterwards. The ship was at sea, the weather fine, and the sea calm. He had complained of being sick and giddy. The arbitrator made the award in favour of the applicants. It was affirmed by the Court of Appeal by a majority. The Lords before whom the case was heard were Lord Loreburn L.C., and Lords Ashbourne, Alverstone, and Shaw. This time the case of *Mackinnon* v. *Miller* (1) was cited and not treated as overruled by the case of *Wild Rose*. (3) Lord Loreburn took practically no notice of the overruling of his judgment in the *Wild Rose* case. Lord Shaw, who had been a party to it, distinguished the case upon the ground that the ship was at sea, and that the deceased man was on deck on duty.

Then, in 1914, came up the case of *Lendrum* v. *Ayr Steam Shipping Co.* (4) This time the point of distinction that the ship in the *Wild Rose* case (3) was in the harbour and in the

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(1) 1909 S. C. 373.
(2) [1912] A. C. 238.
(3) 1910] A. C. 486.
(4) [1915] A. C. 217.

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Swansea Vale case (1) at sea was not available. This was again the case of a ship in harbour. The man was a steward. He had gone to bed, was missed, and his body was found drowned, in his night dress, next day in the water about where the ship had been. It was proved that he was frequently sick. The arbitrator found that the death was by accident arising out of and in the course of employment. The Second Division of the Court of Session, conceiving they were bound by the case of the *Wild Rose* (2), reversed the decision. Appeal was taken to this House, and the noble Lords who sat were Lord Loreburn L.C., Lords Atkinson, Shaw, Parmoor, and myself. The House reversed the decision and restored the finding of the arbitrator. Lord Loreburn practically repeated the opinion which he had given when dissenting in *Marshall* v. *The Wild Rose.* (2) Lord Atkinson dissented, and again relied upon *Wakelin* v. *London and South Western Ry. Co.* (3) Lord Parmoor agreed with the Lord Chancellor. Lord Shaw, remembering his decision in the *Wild Rose* case (2), rested his conclusion on the fact that the man was given to vomiting, and that that had led him to the dangerous place at the bulwark. I dissented, because I thought the case was ruled by the *Wild Rose* (2), there being, in my opinion, not any evidence to show that he was near the bulwark, and his duties as steward not taking him there, as did the duties of the seamen on watch in *Swansea Vale* v. *Rice.* (1) The case of *Mackinnon* v. *Miller* (4) was again cited, and was approved by all the noble Lords and not treated as overruled by *Marshall.* (2)

This case of *Lendrum* (5) is really the last word in this class of case, and it is perhaps worthy of notice to see how different minds work and yet arrive at the same result by comparing the words of Lord Loreburn with those of Lord Shaw in that case, they both being on the same side.

Lord Loreburn (6) says: "This class of case has led to much refinement. I do not find it very profitable to consider whether the arbiter's award proceeded on inference or on some kind of speculation which was described in argument by four words successively, namely, conjecture, probability, guess and surmise. I am not qualified to draw a precise line between the thoughts suggested by those several words. They seem to me to run into one another."

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(1) [1912] A. C. 238.
(2) [1910] A. C. 486.
(3) 12 App. Cas. 41.
(4) 1909 S. C. 373.
(5) [1915] A. C. 217.
(6) [1915] A. C. 222.

Lord Shaw (1) says: "I am responsible, I observe, in some of these decisions for raising a distinction between an inference and a conjecture. The distinction is as broad as philosophy itself. It is that an inference rests upon premises of fact and a conjecture does not."

May I suggest another form of words to which perhaps both of the noble Lords might have agreed? The question will always be whether the proved facts will reasonably support the conclusion which has rested upon them.

I think I have now quoted all the cases in this House which directly deal with the principles on which we have to decide the present case. I have foreborne to quote dicta of learned judges in the Courts below, because the authority of judgment in this House is the only authority that is binding on us, but I may say at once that one could quote many judgments in which are embedded the tendencies of which I have spoken either on the one side or the other.

There are, of course, many other cases which deal with the phrase "arising out of and in the course of the employment." They may here be put aside. There are cases where the question was whether a man was away on his own business and had not reached the place of his employment, and there has been a great deal of difference of judicial opinion on these cases. I refer to such cases as *Moore* v. *Manchester Liners* (2); *Kitchenham* v. *S.S. Johannesburg* (3); *Davidson & Co.* v. *Officer.* (4)

Let me now say a word about what is accident. Violence of a certain sort—I cannot say of every sort, after the case of *Trim Joint District School* v. *Kelly* (5), in which I dissented

(1) [1915] A. C. 233.
(2) [1910] A. C. 498.
(3) [1911] A. C. 417.
(4) [1918] A. C. 304.
(5) [1914] A. C. 667.

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—and suicide exclude accident. As to this I would like to call attention to the case of *Pomfret* v. *Lancashire and Yorkshire Ry. Co.* (1) In that case, as here, the man was held to have fallen out of a railway carriage window. The case was twice heard. At the first hearing there was a difference of opinion, and it is noticeable that the headnote rightly sets forth the effect of the first judgment as it would have stood, but really it does not do justice to the second hearing of the case. At the first hearing there was no evidence except that the man was found on the line, having previously been in the carriage. All that the extra evidence led before the second hearing did was that it proved that another man was in the compartment, who, however, was looking the other way when the man fell out, and I cannot see how that conclusively proves that the act was not voluntary. I agree that the arbitrator was entitled to find as he did, but the point is that, after all, the question of suicide when nothing is absolutely known depends on a balance of probabilities. I would refer to what I said about probabilities in *Mackinnon's* case. (2) The passage is too long to quote, but I have nothing to retract in the opinion I then delivered. I do not think that there need be a substantial finding such as was found in that case negativing suicide.

Now, the outcome of this swing of the pendulum, for it cannot be controverted that there was such, and at the same time the only method of keeping to the theory which binds us that the judgments of this House cannot be contradictory, seems to me to be this. Putting aside violence from without, and such action of the deceased as is equivalent to suicide, or at least to some exposure to an added peril, the result of the cases of unaccounted for death seems to me to be as follows :—

If the deceased was in the course of his employment, as that was explained in the case of *M'Neice* v. *Singer Sewing Machine Co.* (3), which was approved by this House in *Dennis* v. *White* (4) and *Thom or Simpson* v. *Sinclair* (5), if there are facts from which it may be deduced that his employment brought him within, or allowed him to be within, proximity of the peril to which his death could properly be ascribed, and the arbitrator comes to the conclusion that the accident which causes death arises out of, as well as in the course of, his employment, his judgment should not be disturbed. Equally if he comes to the opposite conclusion it ought not to be disturbed. I do not think the last proposition has ever been clearly laid down ; but I think it ought to be, because we must not be swayed by mere feelings of sympathy.

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(1) [1903] 2 K. B. 718.
(2) 1909 S. C. 373, 378.
(3) 1911 S. C. 12.
(4) [1917] A. C. 479.
(5) [1917] A. C. 127, 139.

I now apply this to the facts in the present case. It has been admitted from the first that the man was in the course of his employment. He was told to go to Gourock by this train. His presence in the compartment was due to the orders he had received. The door and the window of a railway compartment are dangerous places in the same sense as the bulwark of a ship is a dangerous place. The arbitrator came to the conclusion that he fell accidentally out of the window. I think he had evidence on which he could so find, though I think that the finding that he fell out of the carriage would be quite enough. Upon that, he found that the accident arose in the course of and out of his employment. I do not think the Court of Session should have disturbed that finding, and I therefore move that the appeal be allowed and the finding of the arbitrator restored. The appellant must have her expenses in the Court of Session and such costs in this House as are allowed in the case of persons suing in forma pauperis.

LORD TOMLIN. My Lords, the question for determination on this appeal is whether the accident which caused the death of the workman and which admittedly occurred in the course of his employment arose out of the employment.

The facts of the case do not call for repetition. They have already been stated by the noble and learned Viscount on the Woolsack.

The function of the Court upon a special case stated by an arbitrator under the Act in question is confined to considering whether the arbitrator has erred in point of law by drawing an inference without any evidence to support it or otherwise by misdirecting himself. It is not for the Court to treat the case as one for fresh decision where the conclusion of the arbitrator, though unimpeachable in law, does not commend itself to the judgment of the Court. This consideration necessarily determines the angle of approach to the problem.

I think that a starting-point for an examination of the matter is to be found in the judgment of the noble and learned Viscount on the Woolsack (when Lord President) in the case of *Mackinnon* v. *Miller*. (1) That judgment concluded with these words: "It seems to me that each case must be dealt with and decided upon its own circumstances, and that inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony."

That case has been referred to with approval in this House in the *Owners of S.S. Swansea Vale* v. *Rice* (2) and in *Kerr* or *Lendrum* v. *Ayr Steam Shipping Co., Ld.* (3)

The real difficulty, however, occurs in determining in any given case what circumstances afford in point of law ground for drawing a particular inference.

I propose to refer to one or two passages from opinions expressed in previous cases before your Lordships' House which, in my judgment, afford in such cases as the present a working rule for resolving this difficulty.

In *Craske* v. *Wigan* (4) Buckley L.J. had expressed the view that the words "out of" point to the origin and cause of the accident, and the words "in the course of" to the time, place, and circumstances under which the accident takes place. In commenting upon this observation Viscount Haldane, in *Thom or Simpson* v. *Sinclair* (5) said: "I doubt whether the time, place, and circumstances can properly be so sharply distinguished from other conditions which are described as belonging to the origin and cause as these words suggest."

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(1) 1909 S. C. 373.
(2) [1912] A. C. 238.
(3) [1915] A. C. 217.
(4) [1909] 2 K. B. 635, 639.
(5) [1917] A. C. 127, 138.

In *Dennis* v. *A. J. White & Co., Ld.* (1), where a street accident had happened to a boy sent on a bicycle to deliver a message, Lord Parker of Waddington's opinion contains the following passage: "Most employments have peculiar risks inherent in their nature. A person employed to break stones runs the risk of being injured by a flying splinter. A person employed to climb a ladder runs the risk of injury from a fall. In neither case would positive evidence be necessary to prove that the injury by accident arose out of the employment. That it did so arise would be a legitimate inference from the nature of the employment coupled with the occurrence of the accident causing the injury."

The noble and learned Lord then added that there might be risks so general that without further evidence no such inference would arise, as, for example, the case of a man struck by lightning.

In *A. G. Moore & Co.* v. *Barkey* (2), in which an accident occurred from an explosion of gas in a mine, Viscount Haldane made the following observations: "Now under these circumstances the Sheriff-Substitute has said: 'There is no doubt that the accident arose in the course of the employment, but I think that Barkey's representatives are bound to prove that it arose out of his employment and they have not discharged the onus, and therefore Barkey's representatives are not entitled to recover.' I think in saying so the learned Sheriff-Substitute made a mistake as to the onus of proof. As soon as it was shown, as it was shown, that Barkey was acting in the course of his employment and that the accident arose out of the employment in so far as he was actually doing his work when the accident took place, then prima facie he was within the statute, and he could only be taken outside the statute if it is proved that he himself added a peril or did something which took his action outside the scope of his employment."

To these expressions of opinion in your Lordships' House I will add one from a judgment in the Court of Session.

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(1) [1917] A. C. 479, 492.

(2) [1923] A. C. 790, 795.

In *Millar* v. *Refuge Assurance Co.* (1) Lord Kinnear said: "A risk is specially connected with a man's employment if it is due to the particular place where his employment requires him to be at the time."

Now, my Lords, from these passages to which I have referred I think this rule may be deduced for application to that class of case which may be called unexplained accident cases—namely, that where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk, and to hold that the accident arose out of the employment; but the inference as to the origin of the accident may be displaced by evidence tending to show that the accident was due to some action of the workman outside the scope of the employment.

Such a rule so stated seems to me to be consistent with all the previous decisions of your Lordships' House, including *Marshall* v. *Owners of S.S. Wild Rose* (2), where there was some evidence from which it could be inferred that the seaman who fell overboard had by action of his own outside his employment added a peril to his position.

The learned Sheriff-Substitute has by findings excluded suicide and death by violence. Upon his findings up to and including No. 36 it must, in my opinion, be taken that at the time of the accident the deceased was travelling in the railway carriage in the course of his employment subject to the inherent risks, slight though they may ordinarily be, of falling from the carriage through insecurely fastened doors or open windows.

In the absence of any evidence of action by the deceased outside his employment the rule which I have ventured to formulate makes it, I think, legitimate to infer that the deceased met his death accidentally by falling from the railway carriage, and to hold that the accident arose out of the employment.

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(1) 1912 S. C. 37, 43.

(2) [1910] A. C. 486.

In finding No. 37 the learned Sheriff-Substitute has pinned himself to a fall from the window. I think that the proper inference ought to have been one less precise, as I have already indicated. A fall through the door is not, to my mind, excluded by the evidence as to the position and condition of the door after the arrival of the train at Gourock.

This, however, is not, in my view, a matter of any moment. The application to the case of the rule produces the same ultimate result and makes it impossible, in my judgment, for your Lordships' House to say that the question of law raised by the special case ought to be answered otherwise than in the affirmative.

LORD THANKERTON. My Lords, the deceased workman, a railway guard, having signed on for his day's work on September 17, 1928, was instructed to travel by the 9.3 A.M. train from the Central Station, Glasgow, to Gourock in order to take charge of a train from Gourock to Glasgow. On his way to Gourock, being alone in a compartment, he lost his life by falling from the train in Bishopton Tunnel. It is admitted that he lost his life by accident in the course of his employment, and the question for decision by your Lordship is whether, on the facts stated by him, the learned arbitrator was entitled to find that the accident arose out of the deceased's employment.

The province of your Lordships' House in this case may be stated in the words of my noble and learned friend (then Lord President Dunedin) in the case of *Mackinnon* v. *Miller* (1), which were adopted by this House in *Lendrum* v. *Ayr Steam Shipping Co., Ld.* (2), as follows: "If the learned Sheriff-Substitute's view was based upon such want of evidence, or such disregard of evidence, that we could say that it was a view to which no reasonable man had fairly a right to come, we could, although the question was one of fact, I think, correct his judgment. But I cannot say that I think that the

(1) 1909 S. C. 373, 378, 380. (2) [1915] A. C. 217; 1914 S. C. (H. L.) 91.

inference that he drew from those facts was so violent as to entitle us to interfere with it." He adds: "It seems to me that each case must be dealt with and decided upon its own circumstances, and that inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony."

It is unnecessary to detail the facts again. There is no direct evidence as to how the deceased came to fall from the train, and the question is whether there was circumstantial evidence from which the learned Sheriff-Substitute was reasonably entitled to infer that the accident arose out of the deceased's employment. The Sheriff-Substitute has excluded death by violence or suicide, and his findings were not challenged in that respect. Accordingly, the case is one where it is sufficiently established that the deceased met his death by accidental circumstances, but there is no direct evidence as to how the accident occurred.

My Lords, I am of opinion, on consideration of the many authorities cited, that the principle to be applied in such cases is that if the accident is shown to have happened while the deceased was in the course of his employment and at a place where he was discharging the duties of his employment, and the accident is capable of being attributed to a risk which is ordinarily inherent in the discharge of such duties, the arbitrator is entitled to infer, in the absence of any evidence tending to an opposite conclusion, that the accident arose out of the employment.

Turning to the decisions of your Lordships' House, the earliest to which I need refer is the case of *Marshall* v. *Owners of S.S. Wild Rose* (1), in which an engineer employed on board a steam trawler lying in harbour was found drowned near the rail on the starboard quarter where he was in the habit of sitting in hot weather. He was last seen emerging from his berth, half undressed, late at night, when he said he thought he would go on deck for fresh air. The arbitrator awarded compensation on the view that there was evidence to show that the deceased was sitting on the rail, from which he fell

(1) [1910] A. C. 486.

into the water, and that, it being in the course of his employment, it was legitimate to infer that the accident arose out of his employment. The Court of Appeal held that this conclusion was not justified by the evidence, and their decision was affirmed by a majority of this House, composed of Lord Atkinson, Lord Shaw, and Lord Mersey (dissenting Lord Loreburn L.C. and Lord James). Lord Atkinson says (1): "Nothing is stated as to the condition of the vessel's deck, or as to the manner in which she was moored, or whether she was in such a position that the body of the deceased must have been kept precisely in the place in which it fell into the water; but because it was found under the place where it is alleged the crew, or some of them, usually sat, it is assumed apparently that he was sitting in that place, and in some way or other fell in from there; whereas, for all that appears, he might have fallen into the water from some other part of the vessel, and his body, either owing to his struggles, if he did struggle, or to some other cause, have floated to the place where it was found." And he further says (2): "Even, therefore, if it had been proved (which it was not) that the deceased, when he left his bunk, sat upon this seat, then, having regard to the time at and circumstances under which he did it, and the great probability that he would drop asleep, it does not, in my opinion, at all follow that the risk of falling into the water was a risk incident to or connected with his employment, while his ship was in port and at such a time and under such circumstances, or his drowning an accident arising out of his employment; though it may well be that the risk of being blown or swept overboard or of falling overboard while his ship was at sea was such a risk." Lord Shaw and Lord Mersey express similar grounds for their conclusion. I understand these grounds of decision as being that there was no evidence in that case to justify the arbitrator in finding that the deceased fell off the ship at any one point, and that, even if he was entitled to find that the deceased fell off the rail in question, there was no evidence "to associate this man's duty with being at the side of the ship," i.e., at

(1) [1910] A.C. 491.

(2) [1910] A.C. 493.

the rail, to apply the test of my noble and learned friend Lord Dunedin in the case of *Lendrum* (1), to which I will refer later.

The next case is that of *Richard Evans & Co., Ld.* v. *Astley.* (2) Astley was brakesman on the second of two trains which were running as one train though not coupled, and which were approaching points which would necessitate the brakesman from one of the trains getting down to work the points. Astley's train was shunting, and he was on the foremost truck, and endeavoured to climb on to the brake-van of the other train, but in doing so he fell and was killed; there was no direct evidence as to his purpose in doing so. The arbitrator drew the inference that the deceased was preparing to get down to attend to the points by the very dangerous way of first getting on to the brake-van ahead, where he would have steps to the ground when the proper time arrived for him to alight, and he awarded compensation. This House, in affirming the Court of Appeal, held that the arbitrator was entitled to draw the inference, and sustained the award. Here again, though there was no direct evidence as to the deceased's purpose in climbing on to the other train, the accident occurred at a place where the discharge of his duties required him to be, and Lord Robson stated (at p. 687): "When a workman is killed in the course of his employment while engaged in some act reasonably consistent with his master's service, I think it requires some more definite evidence than the appellants can suggest in this case in order to found the inference that he was moved by a wrongful intention."

In *Swansea Vale (Owners)* v. *Rice* (3) an officer while on duty on his ship at sea fell overboard and was drowned; no one saw him fall overboard. It was held that the arbitrator was entitled to draw the inference that the accident arose out of the employment. Lord Loreburn L.C. says: "We know that this man at an early hour complained of being sick and giddy. He was on deck discharging a responsible office at into the water, and that, it being in the course of his employment, it was legitimate to infer that the accident arose out of his employment. The Court of Appeal held that this conclusion was not justified by the evidence, and their decision was affirmed by a majority of this House, composed of Lord Atkinson, Lord Shaw, and Lord Mersey (dissenting Lord Loreburn L.C. and Lord James). Lord Atkinson says (1): "Nothing is stated as to the condition of the vessel's deck, or as to the manner in which she was moored, or whether she was in such a position that the body of the deceased must have been kept precisely in the place in which it fell into the water; but because it was found under the place where it is alleged the crew, or some of them, usually sat, it is assumed apparently that he was sitting in that place, and in some way or other fell in from there; whereas, for all that appears, he might have fallen into the water from some other part of the vessel, and his body, either owing to his struggles, if he did struggle, or to some other cause, have floated to the place where it was found." And he further says (2): "Even, therefore, if it had been proved (which it was not) that the deceased, when he left his bunk, sat upon this seat, then, having regard to the time at and circumstances under which he did it, and the great probability that he would drop asleep, it does not, in my opinion, at all follow that the risk of falling into the water was a risk incident to or connected with his employment, while his ship was in port and at such a time and under such circumstances, or his drowning an accident arising out of his employment; though it may well be that the risk of being blown or swept overboard or of falling overboard while his ship was at sea was such a risk." Lord Shaw and Lord Mersey express similar grounds for their conclusion. I understand these grounds of decision as being that there was no evidence in that case to justify the arbitrator in finding that the deceased fell off the ship at any one point, and that, even if he was entitled to find that the deceased fell off the rail in question, there was no evidence "to associate this man's duty with being at the side of the ship," i.e., at received an order to prepare and serve a meal for the crew, that he understood the order and got up out of the bunk where he had been sleeping with the view of fulfilling the order, that when the accident must have happened he would naturally have been in the course of actively executing that order, and that the captain understood he was at the time of the accident so employed, and that the deck from which he must have gone overboard was a place where he might have occasion to be in discharge of his duties. This being proved, it seems to me that very little more was required to lead reasonably to the inference at which the arbitrator has arrived"; Lord Guthrie found that additional circumstance in Lendrum's known liability to vomiting over the side of the ship. Lord Loreburn's opinion is expressed in the following words (1): "This man was in his bed, and a few minutes afterwards he was in the water. Murder is negatived. Suicide is negatived. There is absolutely nothing that points to either. No suggestion was made either of the one or the other, and the arbitrator has negatived both. The man was on the ship, a place of some danger if you are careless, in pursuance of his duty. It was not found that he had withdrawn himself from his duty. I really do not know whether he fell overboard because he was trying to vomit over the ship's side. I think he must have fallen over by accident while on board as his duty required." I find difficulty in distinguishing this from the noble and learned Lord's reasoning which placed him in the minority in *Marshall's* case (2) already referred to. But, even accepting it as sound, it conforms to the principle that I have ventured to state that it must be shown that the accident occurred at a place where the discharge of the duty of the deceased required him to be. Lord Atkinson and Lord Dunedin dissented on the ground that there was no evidence from which the arbitrator was entitled to infer that at the time when the accident occurred Lendrum was engaged in the discharge of the captain's order. Lord Dunedin says (3): "I can only say that I look in vain

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(1) [1915] A. C. 217; 1914 S. C. (H. L.) 91.

(2) [1911] A. C. 674.

(3) [1912] A. C. 238, 240.

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(1) [1910] A.C. 491. (2) [1910] A. C. 493.

(1) [1915] A. C. 223.
(2) [1910] A. C. 486.
(3) [1915] A. C. 240.

for any evidence in this case. It all turns on one point, whether there is any evidence which, so to speak, associates this man's duty with his being at the side of the ship. I can find none."

In *S.S. Serbino* (*Owners*) v. *Proctor* (1) it was held that there was evidence to support the inference drawn by the arbitrator that the chief engineer, who was last seen going to the stern of the ship and was drowned, went to the stern to examine the propeller, which had been injured, and the finding that the accident arose out of the employment.

Of the other cases cited, *Grant* v. *Glasgow and South Western Ry. Co.* (2); *O'Brien* v. *Star Line, Ld.*(3); and *Lynch* v. *Crown Steamship Co.* (4) proceed on the principle suggested; but in my opinion the case of *Mackinnon* v. *Miller* (5), already referred to, cannot stand with the subsequent decision of this House in *Marshall* (6), in which, it may be noted, *Mackinnon's* case was not cited. In *Mackinnon's* case the engineer on a tug at Kinlochleven jetty was last seen in his bunk at 5 A.M. His body was found a few days later, clad only in a night dress, in the water near where the tug had been moored. The accident admittedly arose in the course of the employment, and the arbitrator was held entitled to draw the inference that it also arose out of the employment. My noble and learned friend (then Lord President Dunedin) based his judgment on a dictum of Kennedy L.J., to which he referred as follows (7): "In the case of *M'Donald* (8) a donkeyman, who had gone on shore and was returning on board his ship, fell off the gangway and was killed, and no more being known about it, the judges said that there were no facts there from which they were driven to draw the inference that it was in the course of his employment. But I think Lord Justice Kennedy foresaw just such a case as we have here, because, having given his opinion to the effect I have just stated, and having pointed out that the onus was upon those who sought to prove that the accident was in the course of the employment, he says this : ' At the same time I wish to be understood as deciding upon the particular facts of this case in this respect, that we have to consider the case of an accident happening to a man at a place where he would not necessarily or naturally be in order to fulfil the duties of his employment. I express no opinion as to the propriety or impropriety in point of law of an inference bringing an accident within the terms of the Act of Parliament where that accident has happened upon the premises where the workman's service is to be rendered to his employer, as, for example, if this workman had been found fatally injured by a fall in the stokehold or any other part of the ship where, in the course of his duty, he might naturally and properly be, although there were no circumstances to show why at the particular moment he was there or what the particular duty was which called him there. In the present case the accident happened whilst M'Donald was outside the ship, and without proof that there was anything which at the time and place of the accident made it part of the duty of his service to incur the risk which proved fatal.' " Lord M'Laren says (1) : " There are many cases where an accident may arise while a man is on the master's premises, but not engaged in active work, and whether he is there going about the premises in the ordinary course of business, or whether he is going about the premises in pursuance of the necessities of life, such as eating, drinking, respiration, and other things that need not be mentioned, and is not doing anything that is either wrong or against his contract or outside his employment, in such a case I do not doubt that the accident must be treated as one arising out of his employment." That decision was clearly based on the view that, it being sufficiently proved that the workman fell off the ship, which was so to speak the sphere of his employment, the arbitrator was entitled to draw the inference that the accident arose out of the employment, although it was not shown that he was discharging any particular duty at the point on the ship from which he fell or at the time when he fell. This is

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(1) [1916] 1 A. C. 464.
(2) 1908 S. C. 187.
(3) 1908 S. C. 1258.
(4) 1916 S. C. 695.
(5) 1909 S. C. 373.
(6) [1910] A.C. 486.
(7) 1909 S. C. 380.
(8) [1908] 2 K. B. 926.

(1) 1909 S. C. 381.

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the view which was expressed by Lord Loreburn in his dissent in *Marshall's* case (1) and which was negatived by the decision of the majority of your Lordships. As regards the case of *Pomfret* v. *Lancashire and Yorkshire Ry. Co.* (2) I am unable to reconcile the views expressed by the majority of the Court of Appeal at the first stage of the case with the decisions of this House, to which I have already referred, but the opinion of Mathew L.J. appears to me to be sound and in accordance with principle. Sir Richard Henn Collins M.R. applied the standard of proof of negligence as exemplified in the case of *Wakelin* v. *London and South Western Ry. Co.* (3), but the application of that test is clearly inconsistent with the decisions of this House, and in particular with the case of *Lendrum* (4) already referred to.

Turning now to the facts of the present case, the deceased is proved to have been carrying out his orders to travel as an ordinary passenger at the time when, and at the place where, he fell out of the train, and in my opinion it cannot be disputed that it is possible for a railway passenger without any abnormal conduct on his part to fall through an open window or through an insecurely fastened door of a train by pure accident, though the former may be less probable than the latter occurrence. The learned Sheriff-Substitute has preferred the alternative of the window in finding 37, but in my opinion the evidence as to the position and condition of the door after the accident is not inconsistent with the deceased having accidentally fallen through the door, and the door, the hinges of which were toward the front of the train, having been thereafter shut by the forward motion of the train. But finding 37 is not essential to the conclusion of the Sheriff-Substitute, and, applying the principle above referred to, I am of opinion that he was entitled on findings 1 to 36 to draw the inference that the accident to the deceased arose out of his employment and that the award should be upheld by answering the question of law in the affirmative.

(1) [1910] A. C. 486.
(2) [1903] 2 K. B. 718.
(3) 12 App. Cas. 41.
(4) [1915] A. C. 217; 1914 S. C. (H. L.) 91.

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Interlocutor of the First Division of the Court of Session in Scotland reversed and determination of the Sheriff-Substitute of Renfrew and Bute restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondents to pay the costs of the action in the Court of Session and also the costs of the appeal to this House, such last mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, Feb. 13, 1931.

Agents for the appellant: *Findlay, M'Clure & Co., for C. M. Scott, Glasgow, and W. T. Forester, Edinburgh.*

Agents for the respondents: *H. L. Thornhill and Alexander Eddy, for James Wilson, Writer, Glasgow, and John C. Brodie & Sons, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* DIGGINES . . . . APPELLANT;

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Dec. 15.

AND

FORESTAL LAND, TIMBER AND RAILWAYS COMPANY, LIMITED . . RESPONDENTS.

Revenue—Income Tax—Foreign Possessions—"Stocks, shares or rents"—Mode of Assessment—Dividends from Shares of Foreign Companies—Whether each Holding a separate Source of Income—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case V., rr.* 1 *and* 2.

By r. 1 of the Rules applicable to Case V. of Sch. D of the Income Tax Act; 1918: "The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I., whether the income has been or will be received in the United Kingdom or not":—

Held, that the income on the full amount whereof the tax was to be computed meant the income arising from the class of foreign possessions consisting of stocks, shares or rents, and not the income arising from the separate items making up that class.

An English company holding shares in several foreign companies claimed that for the purposes of assessment to income tax each holding should be treated as a separate source of income.

Held, that the assessment for each year should be arrived at by including the average amounts of the whole of the dividends arising to the company from foreign companies in the three years of average.

The reasoning of the First Division of the Court of Session in Scotland in *Inland Revenue Commissioners* v. *Drysdale's Trustees* (1928) 13 Tax Cas. 565 disapproved.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal affirming an order of Rowlatt J., whereby an appeal upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed.

The respondent company having its registered office in London appealed against assessments to income tax made upon it in respect of foreign possessions for the six years ended on April 5, 1927.

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, AND LORD THANKERTON.

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The company in each of those years held shares in several foreign companies. In each year the company received dividends from one or more of these companies and in each year one or more of the companies failed to pay any dividends. The income for the year of charge was, under rr. 1 and 2 of Case V. of Sch. D of the Income Tax Act, 1918, to be estimated on the basis of the amount of the average for the three preceding years.

Except for the last year of charge *Whelan* v. *Henning* (1), which was abrogated by s. 22 of the Finance Act, 1926, applied, so that if there were no income arising from the source to be charged in the year of charge no liability would arise in respect of that source, notwithstanding that in any one or more of the three preceding years such income might have arisen.

On behalf of the company it was contended that the assessments should be made upon the footing that each of the holdings of shares was a separate source of income separately assessable under the provisions of Case V.

On behalf of the Inspector of Taxes it was contended that the assessment for each year should be arrived at by including the average amount of the whole of the dividends arising to the company from foreign companies in the three years of average.

The Commissioners upheld the contentions on behalf of the company.

Rowlatt J. affirmed the determination of the Commissioners on the ground that he was bound by the reasoning of the Court of Session in *Inland Revenue Commissioners* v. *Drysdale's Trustees.* (2)

The Court of Appeal by a majority (Lord Hanworth M.R. and Lawrence L.J.; Greer L.J. dissenting) affirmed the decision of the learned judge.

1930. Nov. 17. *Sir William Jowitt A.-G.* (with him *Sir Stafford Cripps S.-G.* and *Reginald Hills*) for the appellant. This appeal raises a question as to the proper mode of assessment to income tax in the case of foreign possessions. There are four possible views: (1.) That all foreign possessions should be slumped together; (2.) That stocks, shares or rents should form one source of income and foreign possessions other than stocks, shares or rents another; (3.) That stocks should form one class, shares another class, rents a third class, and other foreign possessions a fourth class; (4.) That each particular holding should be separately considered. As to (1.): in the old days income from foreign possessions was always regarded as one collective whole, as appears from s. 100, Sch. D, Case V.; s. 190, Sch. G, Case XI., of the Act of 1842. As to (2.): assuming that any division of foreign possessions is necessary, it must be that contained in rr. 1 and 2 of Case V. of Sch. D of the Act of 1918, namely, stocks, shares or rents and other foreign possessions. That is in accordance with the natural construction of the Rules. In the submission of the Crown either (1.) or (2.) is the right view. As to (3.): even if any further sub-division is admissible and shares are to be treated as a separate source of income, the Crown still succeeds, as in this case the assessments are concerned with shares only. As to (4.): there is no warrant for it in the Act or the rules. As to the authorities: *Brown* v. *National Provident Institution* (1) was concerned with profits on discounts under Case III. of Sch. D. That was a simple case of the subject having neither income nor any source of income, and has no bearing on the present case. *Whelan* v. *Henning* (2), which was concerned with foreign possessions, has no application, for in that case the subject had only one holding of shares in a foreign company. In *Grainger* v. *Maxwell* (3), which arose under Case III. of Sch. D, the point was whether Exchequer bonds and War Loan securities were separate heads of income, and it was held that they were. That case does not touch the present point. *Inland Revenue Commissioners* v. *Drysdale's Trustees* (4), upon which Rowlatt J. based his judgment, was a decision under Case V. A tax-

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(1) [1926] A. C. 293.

(2) 13 Tax Cas. 565.

(1) [1921] 2 A. C. 222.
(2) [1926] A. C. 293.
(3) [1925] 2 K. B. 376; [1926] 1 K. B. 430.
(4) 13 Tax Cas. 565.

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payer was the holder of Australian shares and a partner in an Australian business, and received profits from both. In the year of charge he received dividends on his shares, but received nothing from the business, and the question was whether the two sources of income could be slumped together for the purposes of assessment. It was enough for the Scottish judges to adopt the reasoning of *Grainger* (1), but they went further, and proceeded on the view that the income from distinct foreign possessions should not be massed together and treated as a single unit, but that each foreign possession should be separately considered. In the appellant's submission the line of reasoning upon which the decision proceeded was wrong.

Sir Patrick Hastings K.C. and *Latter K.C.* (with them *J. H. Bowe*) for the respondents. The tax is charged by s. 1 of the Income Tax Act, 1918, and the first section of Sch. D in conjunction with the annual Finance Act. The charge in s. 1 is on all property, profits, or gains, and one is referred to the Schedules to ascertain the description of the property. The tax is to be charged in accordance with the Rules applicable to the Schedules, but the rules relate to computation and not to charge. Every individual item of profit must be treated separately. No one will dispute that if a subject has two trades he will be liable to be separately assessed in respect of those two trades. So in respect of a trade and a profession. The second section of Sch. D and the Cases mentioned therein provide merely the means of computation of the profits separately charged by the first section of the Schedule. It is in accordance with the general scheme of the Income Tax Act, 1918, that in respect of each different source of income or profits there should be a separate computation and assessment, and the whole system of deduction at the source is based upon this theory. The reasoning of the Court of Session in *Inland Revenue Commissioners* v. *Drysdale's Trustees* (2) is well founded, and ought to be upheld.

(1) [1925] 2 K. B. 376; [1926] 1 K. B. 430.
(2) 13 Tax Cas. 565.

[They also referred to *Colquhoun* v. *Brooks*. (1)]

Sir Stafford Cripps S. G. replied.

The House took time for consideration.

1930. Dec. 15. LORD BUCKMASTER. My Lords, the appellant in this case represents the Inland Revenue.

The respondents are a limited company, incorporated under the Companies Acts. The question in dispute is as to the methods that should be adopted for estimating the income that the respondents derived during the six years from 1922 to 1927 from their shareholding in a number of foreign companies. Their liability to be taxed is not denied. The point of controversy is whether, for the purposes of the Income Tax Act and the rules made under it, each separate share holding in each foreign company should be treated as an independent Source of income, or whether all the returns ought to be grouped together and treated as a whole.

For reasons which will appear when the facts are more specially examined, it is to the appellant's interest to support the latter view, and the respondents' the former. Before the Commissioners, before Rowlatt J., and in the Court of Appeal the respondents have prevailed, though in the latter Court Greer L.J. dissented.

The provisions of the Income Tax Act, 1918, that are relevant to this dispute can be shortly stated. Sect. 1 enacts that tax for any year in respect of all property, profits, or gains described in the five various Schedules shall be charged in accordance with the Rules applicable to the Schedules. Sch. D declares that under that Schedule the tax should be charged on the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situated in the United Kingdom or elsewhere. And sect. 2 of that Schedule divides into six Cases the property to be charged under the Schedule. Cases IV. and V. are as follows :—

"Case IV. Tax in respect of income arising from securities out of the United Kingdom, except such income as is charged under Schedule C.

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(1) (1889) 14 App. Cas. 493.

Case V. Tax in respect of income arising from possessions out of the United Kingdom."

The rules applicable to these two Cases differ.

The rule under Case IV. provides that the tax shall be computed on the full amount of the income arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not, but contains no provision as to its method of computation. The relevant portion of the rules applicable to Case V., which are those admittedly applicable to the present case, contains a special provision for computation, and is as follows:—

"1. The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I., whether the income has been or will be received in the United Kingdom or not. . . . ."

"2. The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom . . . on an average of the three preceding years as directed in Case I. . . . ."

Now it was decided in the case of *Whelan* v. *Henning* (1) by this House that if in any year there was no income arising from the source to be charged in that year, there was no liability to income tax for that year, notwithstanding that in any one or more of the preceding years such income would have arisen, since the tax is on the income of a particular year, and the method of computation is merely to ascertain the amount. If there was nothing to tax there would be nothing to ascertain. That case applies to the present, though only if the respondents' contention be correct does it make any difference, because in every year there was some income received by the respondents' company from all their

(1) [1926] A. C. 293.

holdings abroad taking them as a whole, but in several cases some of the companies paid their dividends intermittently, so that in one year a substantial sum would be received and in the next nothing at all. It is easy therefore to see that, treating the shares in each foreign company as a separate source of income, the respondents would escape from the tax so far as that company was concerned.

The whole question is whether or not they are entitled to take up this position. Upon this question the case of *Whelan* (1) affords no assistance at all. It merely shows what will happen in certain events on the decision. Nor does the case of *Grainger* v. *Maxwell* (2) carry the matter any farther. The case in which the dicta of the Court are clearly relevant and against the appellant's contention is *Inland Revenue Commissioners* v. *Drysdale's Trustees* (3), which, although it did not in its actual decision cover the point now in dispute, did undoubtedly contain dicta of the learned judges of the Court of Session, which, if accurate, would decide the matter in the respondents' favour.

This case had the unfortunate result of depriving us of the full judgment of Rowlatt J., who, considering himself bound by the Scotch Courts, regretfully thought they had anticipated a judgment which he desired to deliver. I share his regret, as I should have been anxious to have enjoyed the benefit of his judgment.

Now the words for interpretation are few. The annual profits and gains from any kind of property are to be taxed, and this tax, it is declared, shall be charged in respect of incomes " arising from possessions out of the United Kingdom." These possessions are divided under r. 1 into income from " stocks, shares or rents," and income from possessions other than stocks, shares or rents under r. 2.

In my opinion " stocks, shares or rents " are nothing but one division, embracing three heads, of the properties under Case V. to which there is applicable the provision that the tax is exigible whether the income has been received in the United Kingdom or not, thereby distinguishing it from

(1) [1926] A. C. 293.
(2) [1926] 1 K. B. 430.
(3) 13 Tax Cas. 565.

possessions out of the United Kingdom "other than stocks, shares or rents" the income derived from which is not taxed unless so received, the two groups together making up the "possessions out of the United Kingdom" mentioned in Case V. "The full amount thereof" mentioned in r. 1 is not the full amount of each shareholding or stockholding or each rent but of them all.

I can see nothing that requires a series of separate and independent conclusions in respect of the various groups of stocks, shares or rents.

It is, I think, unfortunate that the attention of the Court of Appeal seemed to be mainly centred on the construction of the authorities which, with the exception of *Drysdale's* case (1), really afford no help whatever in settling the problem which this appeal presents.

I think the appeal succeeds, and that the appellant is entitled to a declaration to the effect as I have above indicated.

VISCOUNT DUNEDIN. My Lords, I concur.

LORD WARRINGTON OF CLYFFE (read by LORD THANKERTON). My Lords, this is an appeal by the Crown from an order of the Court of Appeal dated February 13, 1930, whereby that Court by a majority (Lord Hanworth M.R. and Lawrence L.J.; Greer L.J. dissenting) dismissed an appeal from an order of Rowlatt J. dated November 15, 1929, affirming a decision of the Special Commissioners in favour of the subject.

The respondents are a company incorporated under the Companies Acts, and carry on business in this country. In the several years of assessment the company were in receipt of income arising from possessions out of the United Kingdom consisting of stocks and shares in certain foreign companies. In each year they received income from such possessions treated as a whole, but in certain years they received no income from the stocks and shares in certain of the companies individually.

The question in this appeal is whether, as the respondents maintain, the assessments should be made upon the footing

(1) 13 Tax Cas. 565.

that each holding of shares is a separate source of income separately assessable, or, as the Crown contends, the assessment for each year should be arrived at by treating the full amount of the dividends as arising from one source of income only—namely, the aggregate of the stocks and shares for the time being held by the company.

The question turns upon the construction of certain provisions of the Income Tax Act, 1918, and in particular of r. 1 of the Rules applicable to Case V. under Sch. D.

By s. 1 of the Act income tax at the rate fixed for a particular year is charged for that year in respect of all property, profits, or gains respectively described or comprised in the Schedules marked A, B, C, D, and E, contained in the First Schedule to the Act and in accordance with the rules respectively applicable to those Schedules. Thus, though the actual charge is created by s. 1, the mode in which it is to be carried into effect is determined by the Schedules and the rules there referred to. In the present case the material Schedule is Sch. D.

By cl. 1 of this Schedule the tax is charged in respect of, amongst other things, (*a*) the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever whether situate in the United Kingdom or elsewhere for every 20*s*. of the annual amount of the profits or gains.

Clause 2 so far as material to the present question is as follows :—

"Tax under this Schedule shall be charged under the following Cases respectively, that is to say :—

. . . .

"Case IV.—Tax in respect of income arising from securities out of the United Kingdom. . . .

"Case V.—Tax in respect of income arising from possessions out of the United Kingdom;"

. . . .

"and subject to and in accordance with the rules applicable to the said Cases respectively."

We find therefore that, so far, a division is effected between securities out of the United Kingdom and possessions of other kinds out of the United Kingdom, but no further division of such last mentioned possessions. This further division is effected by the rules applicable to Case V.

The material rules are as follows :—

"1. The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I., whether the income has been or will be received in the United Kingdom or not. . . . ."

"2. The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the actual sums annually received in the United Kingdom" in manner therein specified.

The question really turns on the true construction of r. 1. Is the income the "full amount whereof" is to be the basis of the computation the income arising from the "possessions" as a whole, or is it to be the income arising from each separate item of such possessions taken by itself ? The second of these two constructions would involve a separate computation for each item, and the further result that, in accordance with the principle laid down by this House in *Brown* v. *National Provident Institution* (1), there would be no tax at all in respect of any item from which in the year of assessment there was no income arising.

There is no decision on the point in question either in this country or in Scotland. There is however a dictum of the Lord President Clyde in *Drysdale's* case (2), which, if correct, supports the view of the majority of the Court of Appeal.

With all respect to these learned judges I cannot agree with their views. Looking at the words of the rule by itself, and construing them according to their natural meaning, I think the income there referred to is the income arising from the class of foreign possessions thereby dealt with, and not the income arising from a number of items making up

(1) [1921] 2 A. C. 222. (2) 13 Tax Cas. 565.

that class, and I can see no justification for departing from what I conceive to be the natural meaning. On the contrary the fact that the words describing Case IV. and the two first rules under Case V. effect a division for purposes of computation between (1.) securities; (2.) stocks, shares or rents; and (3.) other foreign possessions indicates an intention on the part of the Legislature that such division is to be final and that the further division contended for in this case was not intended to be made.

For these reasons I think the appeal should be allowed and the orders of the Court of Appeal and Rowlatt J. should be reversed, and that an order should be made to the effect that the tax should be computed in accordance with the contentions of the Crown as stated in the Special Case. The respondents should be ordered to pay the costs here and below.

LORD TOMLIN. My Lords, the respondents have for some years owned shares in a number of foreign companies. Dividends on these shares have been paid intermittently.

The respondents in respect of certain years prior to the passing of the Finance Act, 1926, have been assessed to tax under Sch. D, Case V., r. 1, upon the footing that the assessment for each year should be arrived at by including the average amount of the whole of the dividends arising to the respondents from foreign shares in the three years of average, i.e., the three years preceding the year of assessment.

On appeal by the respondents to the Commissioners for the Special Purposes of the Income Tax Acts the Commissioners held that the assessments should be made upon the footing that each of the holdings of shares was a separate source of income separately assessable under the provisions of Case V. of Sch. D, so that where in the year of assessment no dividend was received in respect of any holding no assessment should be made in respect of that holding for that year.

The view of the Commissioners was supported by Rowlatt J., who considered himself bound by the decision in *Inland Revenue Commissioners* v. *Drysdale's Trustees*. (1)

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(1) 13 Tax Cas. 565.

The Court of Appeal (Greer L.J. dissenting) affirmed the judgment of Rowlatt J. and His Majesty's Inspector of Taxes now appeals to your Lordships' House to obtain a restoration of the original assessments.

Sect. 1 of the Income Tax Act, 1918, provides that where any Act enacts that income tax shall be charged for any year at any rate the tax at that rate shall be charged for that year in respect of all property, profits or gains respectively described or comprised in the Schedules marked A, B, C, D and E, contained in the First Schedule to the Act of 1918, and in accordance with the rules respectively applicable to those Schedules.

Up to this point there is nothing, it seems to me, to show what the property, profits and gains chargeable are or whether there is to be for the purposes of the charge any dividing up into separate items of property, profits and gains when ascertained.

For the elucidation of these matters it is necessary to look at the Schedules which will be found to deal with different categories of property, profits and gains, each Schedule containing rules for the charging of tax in respect of the subject-matters to which it relates.

Sch. A deals with property in all lands, tenements, hereditaments and heritages in the United Kingdom.

Sch. B deals with the occupation of such lands, tenements, hereditaments and heritages, and

Sch. C deals with profits arising from interest, annuities, dividends, and shares of annuities payable out of any public revenue.

Under Sch. E tax is to be charged in respect of every public office or employment of profit, and in respect of every annuity, pension or stipend payable by the Crown or out of the public revenue of the United Kingdom, other than annuities charged under Sch. C.

The relevant Schedule—namely, Sch. D—demands a closer scrutiny.

The first section of that Schedule is as follows:—

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1. Tax under this Schedule shall be charged in respect of :—

(*a*) The annual profits or gains arising or accruing—

(i.) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere ; and

(ii.) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere ; and

(iii.) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment, or vocation exercised within the United Kingdom ; and

(*b*) All interest of money, annuities, and other annual profits or gains not charged under Sch. A, B, C or E, and not specially exempted from tax ;

In each case for every twenty shillings of the annual amount of the profits or gains.

Sect. 2 of the same Schedule then proceeds as follows :—

2. Tax under this Schedule shall be charged under the following cases respectively ; that is to say :—

Case I.—Tax in respect of any trade not contained in any other Schedule ;

Case II.—Tax in respect of any profession, employment, or vocation not contained in any other Schedule ;

Case III.—Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case ;

Case IV.—Tax in respect of income arising from securities out of the United Kingdom, except such income as is charged under Sch. C. ;

Case V.—Tax in respect of income arising from possessions out of the United Kingdom ;

Case VI.—Tax in respect of any annual profits or gains not falling under any of the foregoing Cases and not charged by virtue of any other Schedule ;

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and subject to and in accordance with the rules applicable to the said Cases respectively.

Now the effect of the provisions of Sch. D which I have quoted seems to me to be this. The persons to be charged are indicated. The subject-matters of charge are defined. In some cases the subject of charge is a particular item, e.g., " any trade," in other cases the subject of charge is what may be called a block item, e.g., " income arising from securities out of the United Kingdom " and again " income arising from possessions out of the United Kingdom."

The respondents are admittedly chargeable under the Schedule, and up to this point I do not think it could be said that their income arising from foreign shares was not chargeable as a block item under Case V.

But no final conclusion can be reached until the rules applicable to Case V. have been examined.

Rule 1, so far as material, is as follows :—

"The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years as directed in Case I., whether the income has been or will be received in the United Kingdom or not," and then provision is made for certain deductions and allowances.

Rule 2 is as follows :—

" The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account or in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom, on an average of the three preceding years as directed in Case I., without any deduction or abatement other than is therein allowed."

The effect of these two rules, upon their true construction, seems to me to be that what I have called the block item referred to in s. 2 of Sch. D under Case V.—namely, " income arising from possessions out of the United Kingdom "—has to be subdivided into (1.) income arising from stocks, shares or rents in any place out of the United Kingdom, and (2.) income arising from possessions out of the United Kingdom, other than stocks, shares or rents, and that, so far as concerns the first item which results from the sub-division (and this is the only item it is necessary to consider on this appeal), it has for the purposes of the charge to be treated as a block item. In other words, if the taxpayer in the year of assessment receives anything falling within the description of income arising from stocks, shares or rents in any place out of the United Kingdom he is assessable upon the basis of the average of the three preceding years of all receipts falling within the same description.

I can find nothing in the language to justify the taxpayer in separating the income arising from shares from the income arising from stocks or from the income arising from rents, still less in separating the income arising from the shares in one company from the income arising from shares in another company. Indeed if there was to be any separation where is it to stop ? Is there to be a separation between income arising respectively from two classes of shares in one company, and how will the matter stand if shares are sold and other shares of the same class in the same company are subsequently bought ?

The phrase " the full amount thereof " in r. 1 of Case V. in my opinion means the full amount of the " income arising from stocks, shares or rents in any place out of the United Kingdom," i.e., the full amount of all the income having any of the origins mentioned.

For the success of this appeal the inseparability of shares is sufficient, but the examination of the language of the statute which I have made satisfies me that the true effect of the language is as I have indicated.

So far as the observations of the Lord President in *Inland Revenue Commissioners* v. *Drysdale's Trustees* (1) are inconsistent with the view which I have expressed they are not in my opinion well founded.

I think the appeal succeeds.

LORD THANKERTON. My Lords, I concur.

Order of the Court of Appeal reversed, with a direction that the tax should be computed in accordance with the contentions on behalf of the Inspector of Taxes as set forth in the case stated by the Commissioners for the Special Purposes of the Income Tax Acts. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, Dec. 15, 1930.

Solicitor for the appellant: *The Solicitor of Inland Revenue.*
Solicitors for the respondents: *Slaughter & May.*

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(1) 13 Tax Cas. 565.

[HOUSE OF LORDS.]

H. L. (E.)*
1931
Feb. 24.

CONSETT IRON COMPANY, LIMITED Appellants;

AND

ASSESSMENT COMMITTEE FOR NO. 5 OR NORTH-WESTERN AREA OF COUNTY OF DURHAM . . . . Respondents.

Rating—Coal Mine—Mine worked at a Loss—No Letting Value for a Year—Basis of Assessment—Parochial Assessments Act, 1836 (6 *&* 7 *Will*. 4, *c*. 96), *s*. 1.

On an appeal to quarter sessions against a rate for the half-year ended March 31, 1928, in respect of certain coal mines of which the appellants were occupiers. the appellants contended that, inasmuch as the mines had been worked at a loss since 1925, the rateable values thereof should be reduced to nil, or, alternatively, to nominal amounts. On May 10, 1928, the appellants entered into a new lease for a term of twenty years of part of their properties. Quarter sessions found that under the trade conditions prevailing at the time when the rate was made, none of the appellants' properties could be worked except at a loss, and that there was no indication that conditions of trade were likely to improve within a year; and, further that the only basis on which anyone could have been found who might have entered into a tenancy of the properties at that time would have been on the assumption that his tenancy would continue for a term of years and in the hope that conditions of trade would improve during that period. Upon these findings they rejected the appellants' contention:—

Held, that the expression, "term of years," as used by quarter sessions meant a tenancy from year to year, which might be put an end to on notice; that where a colliery was actually being worked by the occupier as a going concern the expectation of better trade subsequent to the year of assessment was a consideration which might be taken into account in arriving at the true assessment; and that, inasmuch as quarter sessions had not included any matter of law which they ought to have excluded, or excluded any matter of law which they ought to have included, the quantum of the rateable values of the mines was a pure question of fact for that Court.

Dictum of Blackburn J. in *Staley* v. *Castleton Overseers* (1864) 5 B. & S. 505, 513, not followed.

Dictum of Cockburn C.J. in *Great Eastern Ry. Co.* v. *Haughley Overseers* (1866) L. R. 1 Q. B. 666, 679, approved and followed.

* *Present:* Lord Sankey L.C., Viscount Dunedin, Lord Warrington of Clyffe, Lord Thankerton, and Lord Russell of Killowen.

H. L. (E.)

1931

CONSETT IRON CO. v. ASSESSMENT COMMITTEE FOR NO. 5 OR NORTH-WESTERN AREA OF COUNTY OF DURHAM.

APPEAL from an order of the Court of Appeal affirming an order of the Divisional Court upon a Special Case stated by the Court of Quarter Sessions for the county of Durham. The appellants, as occupiers of certain mines in the county of Durham, appealed against certain general rates made respectively by the Lanchester Rural District Council and the Benfieldside Urban District Council for the half-year from October 1, 1927, to March 31, 1928.

The facts set out in para. 5 of the Special Case (so far as material) were as follows :—

(1.) The properties in question comprised one drift (Humber Hill) four colliery shafts and plant (Langley Park, Westwood, Medomsley and Derwent) and certain seams of coal underlying the areas surrounding the said drift and shafts.

(2.) The appellants first began to open up the Humber Hill Drift in 1921, and first drew coal from it in 1924. The four collieries referred to in sub-para. 1 had been worked by the appellants or their predecessors for many years.

(3.) The appellants were lessees of these properties under a number of long leases (there being several leases in respect of each colliery) of varying dates and for varying terms of years. The royalty rents payable by the appellants under these leases varied, but the average royalty rent payable was about 7*d*. per ton of coal worked. Many of the leases were not the original leases but were leases which had been entered into at various dates on the expiration of earlier leases of the corresponding areas.

(4.) Certain of the leases contained provisions entitling the appellants to determine them by giving notice to the lessors (in some cases twelve months' notice and in some cases a longer notice than twelve months). On the determination of the leases (whether by notice or by effluxion of time) fixed plant and (in some cases) workmen's houses on which the appellants had expended money would become the property of the lessors without payment by the lessors and would be entirely lost to the appellants, and the appellants would be obliged to expend money in payment for permanent land damage. In cases where the properties were not held under the original leases plant erected by the lessees during the currency of the original leases had already reverted to the lessors but the appellants still had the use of the same under the existing leases.

(5.) In the valuation lists on which the rates appealed against were based the rateable values in the case were arrived at by multiplying the outputs of coal from each of the properties for one year based on the average of the outputs for the two years ending December 31, 1926, by a number of pence per ton according to a scale known as the Lanchester scale, varying from 3½*d.* to 8½*d.* according to the thickness of the seam.

(7.) The average thickness of the seams from which coal was worked by the appellants in 1927 was approximately 3 feet.

(9.) The appellants' collieries and drift were idle from July 3, 1925, to April 18, 1926, by reason of a local strike and from May 1 to December 20, 1926, by reason of the national coal stoppage.

(10.) At the time when the rates appealed against were made, each of the appellants' properties was being worked at a loss and had been so worked ever since the middle of 1925. Tables showing the results of the working for the six months ending September 30, 1927, the six months ending March 31, 1928, and the twelve months ending March 31, 1928, were annexed to the case.

(11.) The conditions of the coal trade in September, 1927, were so bad that the trade would be ruined if they were to continue indefinitely, and there was no indication in or about September, 1927, that they were likely to improve within a year.

Sub-para. 12 contained a list of the results of the workings of all the mines in the county of Durham from the month of January, 1927, to the month of October. This list showed a slight profit for the first two months and a loss for each of the succeeding months.

(13.) It was clear in and about September, 1927, that so long as the conditions of trade then prevailing continued none of the appellants' properties could be worked except at a loss.

(14.) No one would have entered into a tenancy of the properties or any of them in or about September, 1927, at any rent whatever if he had expected that the conditions of trade then prevailing would continue and would not improve to a substantial extent during his tenancy. The appellants on May 10, 1928, entered into a new lease for a term of twenty years in respect of an area forming part of one of the properties at a royalty rent of 6½*d.* per ton, the appellants' earlier lease of the said area having expired.

(15.) The only basis on which any one could have been found who might have entered into a tenancy of these properties or any of them in or about September, 1927, would have been on the assumption that his tenancy would continue for a term of years and in the hope that conditions of trade would improve during that period, so that he would be on the right side on the whole on the average of the whole period of his tenancy.

It was contended on behalf of the appellants:—

(1.) That on the admitted or proved facts the rateable values of the properties above referred to and each of them at all material times, on a true construction of s. 1 of the Parochial Assessments Act, 1836, were nil or alternatively nominal amounts, and that quarter sessions were bound in law to reduce the rateable values of the said properties and each of them to nil or alternatively to nominal amounts.

(2.) Alternatively that the rateable values appealed against were excessive.

It was contended on behalf of the respondents:—

(1.) That in the absence of any agreement and inasmuch as the tonnage to which the Lanchester scale had been applied to arrive at the rates appealed against was the tonnage output for a working of 3½ months only and in all the circumstances the rates appealed against should be confirmed and the appeals dismissed.

(2.) That the appellants' contentions were negatived (inter alia), by the fact that they had entered into a new lease on

May 10, 1928, in respect of an area forming part of one of the said properties and had contracted thereunder to pay a royalty rent exceeding the average tonnage rate upon which they had been assessed in respect of the said properties and with regard to other leases the appellants had refrained from giving notice to determine any of those leases as they might in some cases have done (see para. 5 (4.)).

Quarter sessions did not accept the appellants' first contention, but they decided that the appellants were entitled to relief and that for the purpose of the present appeals the Lanchester scale should be reduced by 1½*d.* per ton for seams of all thicknesses and that the rateable values appealed against be reduced accordingly.

The question of law for the opinion of the Court was whether the appellants' first contention was correct.

The Divisional Court (Lord Hewart L.C.J., Avory and Swift JJ.) affirmed the decision of quarter sessions and the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) affirmed the decision of the Divisional Court.

1931. Feb. 23, 24. *Comyns Carr K.C.* (with him *F. Grant*) for the appellants. The true rateable values of the appellants' properties are the rents at which they might reasonably have been expected to let from year to year in September, 1927, each of them being vacant and to let as a whole. Here quarter sessions have found that no one would have entered into a tenancy of any of the properties in September, 1927, at any rent whatever, if he had expected that the conditions of trade then prevailing would continue and would not improve during his tenancy and that there was at that time no indication that conditions of trade were likely to improve within a year. In *Staley* v. *Castleton Overseers* (1), where a cotton mill which had ceased working owing to the impossibility of getting cotton from America by reason of the civil war was held to be not rateable as a mill, Blackburn J. said: "The facts are that under existing circumstances the hypothetical tenant hiring it as a cotton

(1) 5 B. & S. 505, 513, 514.

mill would not give anything for it, because, working it as a cotton mill in the current year, he would be out of pocket," and later on he said: "The Legislature intended that the rate should be made upon an estimate of the rent which would be given for the property rebus sic stantibus . . . . If there were a reasonable prospect that during the current year the hypothetical tenant would give a higher rent, the amount of that rise might be taken into account, but deferred and reversionary prospects cannot." On the findings of quarter sessions it is impossible to suppose that anybody could be found who would pay a rent for the appellants' properties on a tenancy from year to year. What the actual tenants (the appellants) were relying on in taking a renewal of a lease of part of the property for a term of years was security of tenure, and in effect quarter sessions were finding, in sub-para. 15 of para. 5 of the Case, that that was the only basis on which a tenant could be found for the premises. But that is to alter the language of the Parochial Assessments Act, 1836, from "let from year to year" to "let for a term of years," and is wrong in law. If quarter sessions meant anything different from that there was no evidence to support their finding as applied to a tenancy from year to year. There being no evidence to show any expectation of improvement in the trade conditions quarter sessions were bound to assume the continuance of the conditions existing at the time. On the facts of this case it is impossible to suppose that the hypothetical tenant would give anything for the hereditaments, rebus sic stantibus, or that in the unlikely event of the loss being converted into a profit the landlord would not take advantage of it and give him notice. Further, in the event of such improvement the rating authority would be not only entitled but bound to raise the valuation. "The true principle, according to which the value of the occupation to the hypothetical tenant contemplated by the Parochial Assessment Act is to be estimated, is, to assume the continuance of those circumstances which constitute the value to the existing occupier, unless it be made to appear that those circumstances are about to undergo a change": per Cockburn C.J. delivering the judgment of himself and Blackburn J. in *Reg.* v. *Fletton.* (1) That is in accordance with the statement of the law contained in Ryde on Rating 5th ed., pp. 218, 219, on which the appellants rely. "In order . . . . that a valid rate may be imposed, it is essential that the occupation should be of value beyond what is required to maintain the property; for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent, or a rent, which, after deducting the average annual expense of maintenance, would leave no overplus, there is nothing to rate": per Blackburn J. delivering the opinion of the majority of the judges in *Mersey Docks and Harbour Board* v. *Cameron.* (2) It follows that on the facts of the present case the rateable values of the hereditaments in question should be reduced to nil or to nominal amounts. Assuming that the appellants are wrong in saying that quarter sessions proceeded on the basis of security of tenure, still it is clear that they had regard not to the existing value, but to the prospects of future value, and that in the face of the finding that there was no sign of improvement in the conditions of trade. In so doing they were contravening the principle which is summed up in the phrase "rebus sic stantibus." Their duty was to look at what is and not at what may be. The valuation must be based on real and not imaginary facts. Reliance was placed by Lord Hewart C.J. upon the dictum of Cockburn C.J. in *Great Eastern Ry. Co.* v. *Haughley Overseers* (3) to the effect that the hypothetical tenant in calculating what rent he could reasonably pay was at liberty to take into account the possibility of the duration of the tenancy beyond the current year, but the whole basis of that dictum was the continuance of the existing circumstances.

[He also referred to *Port of London Authority* v. *Orsett Union* (4); *Poplar Assessment Committee* v. *Roberts* (5); *Great*

(1) (1861) 30 L. J. (M. C.) 89, 94–5.
(2) (1864) 11 H. L. C. 443, 461.
(3) (1866) L. R. 1 Q. B. 666, 679.
(4) [1920] A. C. 273, 305.
(5) [1922] 2 A. C. 93, 103.

Western Metropolitan Ry. Cos. v. *Kensington Assessment Committee* (1); *Reg.* v. *South Staffordshire Waterworks Co.* (2); *Denaby and Cadeby Colliery* v. *Doncaster.* (3)]

Wilfrid Greene K.C., *Walter Hedley K.C.* and *Arthur Morley* for the respondents were not called on.

LORD SANKEY L.C. My Lords, this is an appeal from an order of the Court of Appeal, consisting of Scrutton, Greer and Slesser L.JJ., dated January 22 of last year, dismissing an appeal by the appellants from an order of the King's Bench Division, consisting of the Lord Chief Justice, Avory and Swift JJ., dated November 12, 1929, whereby an appeal by the appellants upon a Special Case stated by the Court of quarter sessions for the county of Durham was dismissed and the decision of quarter sessions was affirmed. The question for decision on the appeal, shortly stated, is whether the appellants, the Consett Iron Company, Ld., who are the occupiers of certain coal mines in the county of Durham, are entitled to have the rateable values of the said coal mines for the purposes of general rates for the half year ending March 31, 1928, reduced to nil, or alternatively, to nominal amounts.

The learned counsel who opened the appeal on behalf of the appellants said that he felt that he had the weight of judicial opinion against him—the judgment of the King's Bench Division was unanimous, the judgment of the Court of Appeal was unanimous, and, in addition, the quarter sessions were presided over by a distinguished county court judge, now unfortunately no longer with us. What then are the facts stated in the Special Case, for it is upon the basis of those facts that the decision must ultimately depend ?

I need not go into all of them, but I will draw attention to those which are important for the determination of the case. The rates were made in October, 1927, for the half year from October 1, 1927, to March 31, 1928, and were based on valuation lists then in force for the respective parishes concerned. In the valuation lists the rateable values were arrived at by multiplying the outputs from each of the various mines or drifts for one year based on the average of the outputs for the two years ending December 31, 1926, by a number of pence per ton according to a scale known as the Lanchester scale, Lanchester parish being one of the parishes in which these mines were situated. There is no objection to that method of ascertaining the rateable value, it is one which has very frequently been employed in the rating of colliery properties. The difficulty with regard to rating such properties has been a familiar one for many years, and is due to the fact that the words of s. 1 of the Parochial Assessments Act, 1836, make it difficult to apply the words of Parliament to a colliery. It reads: " No rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." That raises the question on what principles and in what way the Courts have to apply s. 1 of the Parochial Assessments Act, 1836, to hereditaments which are never let on the terms dealt with in that section, but which still, for rating purposes, have to be dealt with as if they were lettable from year to year; and in the lapse of almost a century which has followed the Act all sorts of various methods have been adopted by rating surveyors and approved by the Courts for ascertaining the rateable value of different sorts of property.

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(1) [1916] 1 A. C. 23, 35.
(2) (1885) 16 Q. B. D. 359.
(3) (1898) 14 Times L. R. 347.

Para. 5, sub-para. 11, of the Special Case finds: " The conditions of the coal trade in September, 1927, were so bad that the coal trade would be ruined if they were to continue indefinitely and there was no indication in or about September, 1927, that they were likely to improve within a year." The succeeding sub-paragraph sets out the losses which were sustained in the trading results for the whole of the collieries in the county of Durham in 1927, from the month of January to the month of October, the greatest being in April, 1927, when it was over 6½*d*. per ton. The case proceeds to find that it was clear that in or about September, 1927, and so long as the conditions then prevailing continued, none of the appellants' said collieries could be worked except at a loss. Sub-para. 14 is: "No one would have entered into a tenancy of the said properties or any of them in or about September, 1927, at any rent whatever if he had expected"—the word "expected" is evidently put in as a reminder of the section of the Act to which I have already referred—"that the conditions of trade then prevailing would continue and would not improve to a substantial extent during his tenancy. The appellants on May 10, 1928, entered into a new lease for a term of twenty years in respect of an area forming part of one of the said properties at a royalty rent of 6½*d*. per ton, the appellants' earlier lease of the said area having expired." The only other sub-paragraph which I must read is sub-para. 15, which says: "The only basis on which anyone could have been found who might have entered into a tenancy of the said properties or any of them in or about September, 1927, would have been on the assumption that his tenancy would continue for a term of years"—I do not think that means twenty years, or fifteen years, or a term of years in that sense, but I think it means a tenancy from year to year, which, as has been admitted, may continue until put an end to by due notice—"and in the hope that conditions of trade would improve during that period so that he would be on the right side on the whole on the average of the whole period of his tenancy." The learned counsel for the appellants put a construction upon that sub-paragraph which he says ought to induce the Court to decide the case in his favour; but, in order to see what the construction really is, it is important to observe what the contention of the appellants was, and what the view which the Court of Quarter Sessions took upon it was. Para. 7 of the Case says: "It was contended on behalf of the appellants: (1.) That on the admitted or proved facts the rateable values of the properties referred to in para. 1 hereof and each of them at all material times on a true construction of s. 1 of the Parochial Assessments Act, 1836, were nil, or, alternatively, nominal amounts and that we were bound in law to reduce the rateable values of the said properties and each of them to nil, or alternatively to nominal amounts." That being the contention of the appellants, it is necessary to see what the Court of Quarter Sessions accepted with regard to it. Para. 9 of the Case says: "We did not accept the appellants' first contention"—that is the one which I have already read—"but we decided that the appellants were entitled to relief and that for the purpose of the present appeals the Lanchester scale should be reduced by 1½*d.* per ton for seams of all thicknesses and that the rateable values appealed against be reduced accordingly." Bearing in mind that the Lanchester scale provides different sums ranging from 5*d.* per ton to 1*s.* per ton, it will be seen that the 1½*d.* per ton, which was the reduction recommended by quarter sessions, was very considerable.

Now, what is the meaning of their findings and what is the meaning of sub-para. 15? I agree with what Greer L.J. said in the Court of Appeal. He read para. 9 and then proceeded—and I agree with him: "Now I take that to mean that the Court, if it was open to them so to decide, came to the conclusion upon the facts before them that the rateable value of this property had not been reduced to nil, that is to say, they came to the conclusion that what has been called the hypothetical tenant, even on the facts they had themselves found in the course of their findings in the case, would agree to pay some rent for the premises." If that is the correct interpretation, as I think it is, no Court of Appeal, whether the King's Bench or the Court of Appeal or your Lordships' House, has anything to do with the quantum. It is a question of fact purely for the consideration of the Court of Quarter Sessions, and, in my view, they have found that the mines in question might reasonably be expected to let from year to year at a rent, subject to the statutory deductions, which shows a rateable value. If that is the finding, this appeal is an appeal upon a pure question of fact, which is inadmissible, but in deference to the argument which has been addressed to us, and the cases which have been cited, I propose to add a few words.

It is important to remember that the mine in question was still a going concern. Coal was still being worked. There is no suggestion that it has been shut down, as appears in some of the decided cases. There is no suggestion that it had come to an end, even temporarily. The colliery was—I do not like to use adjectives, and I will not say in full working order—but, at any rate, the colliery and all the mines were working. Now, what ought to be the guiding principle to a Court of Appeal in a matter of this kind? It is, in my view, to be found stated with the greatest simplicity and the greatest accuracy in the judgment of Lord Halsbury in *Mersey Docks and Harbour Board* v. *Birkenhead Union Assessment Committee.* (1) The passage to which I desire to draw your Lordships' attention proceeds: "Surely those who are complaining of what has been done by the tribunal must establish either that something has been excluded from the calculation which by law ought to be included, or that something has been included which by law ought not to have been included."

The learned counsel for the appellants complained that the second limb of that sentence had been contravened, and that something had been included by the Court of Quarter Sessions in coming to a determination which by law ought not to have been included. He relied for that proposition upon the case of *Staley* v. *Castleton Overseers.* (2) That case was decided as far back as the year 1864, and the decision of Blackburn J., to which any lawyer would naturally pay the greatest possible attention, has been frequently quoted in rating cases of this character. The head-note reads: "A cotton mill, owing to depression in the cotton trade, was no longer worked but was maintained at some expense as a factory, with its machinery in a fit state for working when the trade should revive. Held, that the occupiers were rateable for the mill and that the rate should be made upon its annual value as a storehouse for the machinery in it, and not upon an estimate of the rent which might fairly be expected for it if let for a reasonable term of years with the prospect of improvement in value." If it were necessary to distinguish that case—and I hardly think it is, because I am of opinion that none of the cases which have been cited have very much to do with the case now before your Lordships—it appears at once that there is all the difference in the world between it and this one, for it starts by finding that the cotton mill was no longer worked as a cotton mill, but was maintained as a factory with its machinery in a fit state for working when the trade should revive. In the present case, as I have already ventured to point out, the mines in question are still being worked as a going concern. There is one sentence in the judgment of the learned judge to which our attention has been repeatedly called, which says: "The facts are that under existing circumstances a hypothetical tenant hiring it as a cotton mill would not give anything for it because working it as a cotton mill in the current year he would be out of pocket." I should feel great personal hesitation in criticizing any statement of law made by Blackburn J. and I should prefer his opinion to my own, but I think that he is there stating something which was for the decision of the Court of Quarter Sessions. He says: "The facts are that under existing circumstances a hypothetical tenant hiring it as a cotton mill would not give anything for it because working it as a cotton mill in the current year he would be out of pocket." If that were the finding of sessions, I can see the reason for the decision, and if, on the other hand, the sessions found that there was some chance of the cotton mill being opened again very soon and assessed the rateable value, taking that into consideration, I think equally their decision would be upheld, so it is important to look at the arguments which were advanced. In my view the learned judge was referring to the argument which had been advanced by Mr. Kay: "Considering the uncertainty of the cotton trade, the test is what a tenant would give for the mill if it was let out for a reasonable term of years." He is really dealing with those words "a reasonable term of years," and is pointing out that there is no such phrase in the Act of 1836. If I am wrong in putting that interpretation upon the sentence, I cannot help adding that what Scrutton L.J. said about the case appeals to me: "I personally have very grave doubts whether that is right"—he is dealing with the passage I have referred to—"and if it were necessary I should be prepared to say that it is wrong, but in the present case it appears to me that no question as to a house not being occupied, or a factory in which no trade is being carried on, arises. In the present case the trade was being carried on during the whole year of assessment; the benefit derived by the occupier was whatever benefit would be derived from carrying on the trade as a colliery." Greer L.J. says very much the same thing: "In the course of that judgment the learned judge appears to have left out of consideration the question as to whether at the time when the rate was made any proposing tenant would take the premises as a cotton factory in expectation that the American War would soon end, and that while still in occupation he would be entitled to make money out of it as a cotton factory." Slesser L.J., in distinguishing the case, referred to the judgment of the Divisional Court in the case of *Hoyle & Jackson* v. *Oldham Assessment Committee* (1), where Lawrance J. says: "The circumstances in the present case are different from those which existed in *Staley* v. *Castleton Overseers* (2) and *Harter* v. *Salford Overseers* (3), for in those cases the business had actually ceased, and the buildings had been turned from mills into warehouses for machinery, and as far as the ability of the tenants to carry on business was concerned they were in no better position than if their mills had been burned down."

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(1) [1901] A. C. 175, 183.

(2) 5 B. & S. 505, 513.

The true principle to be applied in these cases is that laid down by Cockburn C.J. in the case of the *Great Eastern Ry. Co.* v. *Haughley Overseers*. (4) I need not read the whole of it, for, as usually happens in these rating cases, the facts are somewhat complicated. The learned judge says: "But I

(1) [1894] 2 Q. B. 372, 377.
(2) 5 B. & S. 505, 513.
(3) (1865) 6 B. & S. 591.
(4) L. R. 1 Q. B. 666, 679.

think it is one thing to start with the assumption that you are dealing with a tenancy from year to year, and another thing to say that the hypothetical tenant, in calculating what he can reasonably pay as rent for the premises, is necessarily to assume that his tenancy would not last beyond the year. I think the possibility of its longer duration is one of the surrounding circumstances which the tenant from year to year would take into account. It may be that the circumstances are such that it is worth his while to deal with the stock as though he were certain that his tenancy would not be put an end to at the expiration of the year. He is to calculate for himself how much his stock will be depreciated and what it is worth his while to give, having taken that matter sufficiently into consideration. Now that seems to me to be a question of fact for the sessions "—and he goes on to say: "I do not think there is anything in the statute that makes it necessary or incumbent upon us to say that, if the sessions or the arbitrator have found that fact in a particular way, they must necessarily be wrong."

It is unnecessary to deal with the further cases, but the correct statement of the law may be put as follows. There may be circumstances which prevent the occupier of a coal mine from using it for the purpose of producing coal, and if there are such circumstances he may be entitled to have excluded from consideration, in fixing the amount of the assessment, the expectation that at some future time circumstances will change so as to allow him to use it for that purpose. But where, as in this appeal, a colliery is actually being worked by the occupier for the production of coal, the expectation of better trade subsequent to the year of assessment is a consideration which may be taken into account in arriving at the true assessment. That is what, as it seems to me, the Court of Quarter Sessions have not only purported to do, but what, in fact, they have done. They have left nothing undone which they ought to have done, and they have not done anything which they ought not to have done.

In my opinion the judgment appealed from is correct, and this appeal should be dismissed.

VISCOUNT DUNEDIN. My Lords, I concur, and I have only one sentence to add, and that is about the case of *Staley* v. *Castleton Overseers.* (1) Mr. Comyns Carr, who really said everything for his clients that could be said, admitted that the sheet anchor of his argument was Blackburn J.'s opinion in the case of *Staley* v. *Castleton Overseers.* (1) I do not think it necessary to say what I think Scrutton L.J. said—that he doubted whether the *Castleton* case (1) was rightly decided. I see no reason to think that it was wrongly decided. I do not for a moment see why, if a thing is no longer really used as a mill, but is used as a storage factory, you should not rate it as a storage factory. But what of course would have been of the greatest service to the argument of learned counsel was that one sentence of Blackburn J., in which he, speaking of the question of having it as a mill and not as a storage factory, says: "The facts are that under existing circumstances the hypothetical tenant hiring it as a cotton mill would not give anything for it." Now, if he had stopped there, there would not have been very much wrong; but he went on, "because, working it as a cotton mill in the current year, he would be out of pocket." The point, of course, that would be of infinite service to learned counsel would be that expression, "in the current year." I agree with my noble friend on the Woolsack that one does not easily say that Blackburn J. is mistaken, but I do not mind doing so when I find that Cockburn C.J. and many others have said the opposite, and I agree that one may take as the canon what was said by Cockburn C.J. in *Great Eastern Ry. Co.* v. *Haughley Overseers* (2), where he says: "It is one thing to start with the assumption that you are dealing with a tenancy from year to year, and another thing to say that the hypothetical tenant, in calculating what he can reasonably pay as rent for the premises, is necessarily to assume that his tenancy would not last beyond a year. I think the possibility of its longer duration is one of the surrounding circumstances which the tenant from year to year would take into account." That, of course, is not the same view as in that sentence of

(1) 5 B. & S. 505, 535.
(2) L. R. 1 Q. B. 666, 679.

Blackburn J., which I have read, beginning "because"; but that is the view which has prevailed in many cases since, and that is the view that the assessment committee have taken here, and, taking that, it is a question of fact and nothing else.

LORD WARRINGTON OF CLYFFE. My Lords, I agree with the judgment delivered by the Lord Chancellor, and I also agree with what has just been said by my noble and learned friend Lord Dunedin in reference to the judgment of Blackburn J. in the case of *Staley* v. *Castleton Overseers*. (1) I do not think that the decision of the Court in that case can be successfully attacked, but that one sentence in Blackburn J.'s judgment may be read as not giving true effect to the words of the statute, which are "let by the year," which is a tenancy from year to year, not a tenancy for a year certain. The sentence in Blackburn J.'s judgment seems to indicate that the only term which is to be considered is the current year, that is to say, one year certain. I think the true view is very well put by Greer L.J. in his judgment, where he says: "It does not follow because during the first year of the tenancy there is very little prospect of any profit that it is not worth the while of the proposing tenant to say to himself: 'Though my landlord at the end of six months may give me six months' notice, he is very unlikely to do so, and if he does not do so I will have the right to cccupy for eighteen months, and though at the end of eighteen months from the beginning of the tenancy he may still give me six months' notice, judging by the probabilities and the way business is conducted in matters of this sort, at any rate judging by the probabilities, I do not think he will give me six months' notice; then he will let me go on a little longer.'" That seems to me to be the right view of the Act on that point, and in other respects I entirely concur in the opinions that have been delivered.

LORD THANKERTON. My Lords, I agree.

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(1) 5 B. & S. 505, 535.

LORD RUSSELL OF KILLOWEN. My Lords, I agree. There is, in my opinion, no reasonable doubt as to the meaning of the case stated. I will take one concrete instance as an example—namely, the coal mine, Humber Hill Drift. If you take para. 5, sub-paras. 14 and 15, para. 7, sub-para. 1, and para. 8, of the case and the order of quarter sessions relating to that mine, and read them in conjunction, they involve a finding by the justices upon the facts before them to the following effect—that the Humber Hill Drift mine might reasonably be expected to let from year to year at a rent which, after taking into account the various matters specified in the first section of the Act of 1836, will result in a rateable value of 1822*l.* That is a finding of fact which we cannot disturb unless the justices have taken into account something which they ought not to have taken into account, or have omitted to take into account something which they ought to have taken into account. My Lords, I cannot see that the justices have done either, and I accordingly agree that this appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 24, 1931.

Solicitors for the appellants: *Gregory, Rowcliffe & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

Solicitors for the respondents: *Ward, Bowie & Co., for Longden & Mann, Sunderland.*

[PRIVY COUNCIL.]

J. C.*
1931
Feb. 19.

CANADIAN PACIFIC RAILWAY COMPANY . . . . APPELLANTS;

AND

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR CANADA . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Licence—Licence to erect Telegraph Poles on Crown Land—Trespass—Acquiescence—Revocability of Licence—Absence of Contract—Notice necessary to determine Licence.

Whether any and what restrictions exist on the power of a licensor to determine a revocable licence to occupy land depends upon the circumstances of each case.

In 1926 the Crown proceeded against the appellants alleging that poles, carrying telegraph wires, which they had erected on the roadway of a Canadian Government railway, were a trespass thereon, and claiming damages; alternatively the Crown claimed a declaration of the appellants' rights, if any. As to the main section of the telegraph line, the poles, as they stood in 1926, had been erected upon the roadway between 1905 and 1910 without leave or licence. As to two branch lines, the poles had been erected in 1893 and 1911 respectively, in each case while an agreement was in negotiation though no agreement was eventually concluded. The whole telegraph line, which was about 500 miles in length, was used by the public as well as by the appellants.

Held, (1.) on the facts, that at the date of the proceedings all the poles were on the roadway with the licence of the Crown. Although the appellants had originally been trespassers in respect of the main line poles, many years' acquiescence and a claim to the payment of rent, had long since prevented them from being so regarded; in the case of the branch lines, it was to be inferred that the poles had been erected by licence.

(2.) That the licence was revocable in the absence of any facts from which a contract that it should be irrevocable could be implied.

Plimmer v. *Mayor of Wellington* (1884) 9 App. Cas. 699 and *Ramsden* v. *Dyson* (1866) L. R. 1 H. L. 129 distinguished; *Lala Beni Ram* v. *Kundun Lall* (1899) L. R. 26 I. A. 58 followed.

(3.) That, having regard to the circumstances, the licence could be revoked only by a notice determining it upon a specified future date such as would give the appellants sufficient time, not only to remove the poles and wires, but also to arrange for erecting them elsewhere.

Judgment of the Supreme Court of Canada [1930] S. C. R. 574 reversed

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON, AND LORD RUSSELL OF KILLOWEN.

J. C.
1931
CANADIAN PACIFIC RY. Co.
v.
THE KING.

APPEAL (No. 87 of 1930) by special leave from a judgment of the Supreme Court of Canada (June 11, 1930) in part dismissing the appellants' appeal and in part allowing the respondent's cross-appeal from a judgment of the Exchequer Court of Canada (March 21, 1929).

The Crown, on the information of the Attorney-General for Canada, proceeded against the appellant railway company complaining that they had erected and were maintaining poles carrying telegraph wires along about 500 miles of the roadway of the Intercolonial Railway, part of the Canadian Government Railway system, and that the company had thereby committed and were committing a trespass. Possession and mesne profits were claimed, but by an amendment made at the trial damages were claimed instead of mesne profits, and alternatively a declaration was sought as to the rights (if any) of the company.

The facts appear from the judgment of the Judicial Committee.

The trial judge (Audette J.) made a declaration that the telegraph poles, from the respective dates when they had been erected, had been on the land by the leave and licence of the Crown, but that the licence was not irrevocable. The learned judge gave either party leave to apply for further directions.

Upon an appeal and cross-appeal to the Supreme Court of Canada the judgment was varied. As to the whole line except that between Westville and Pictou it was held that the company had been and were trespassers; and, as to the line between Westville and Pictou, that they had an irrevocable licence. The case was remitted to the Exchequer Court for further trial. The proceedings on appeal are reported at [1930] S. C. R. 574.

1930. Dec. 4, 5, 8, 9, 11. *Tilley K.C.*, *Hon. Geoffrey Lawrence K.C.*, and *C. F. H. Carson* for the appellants.

Rowell K.C. and *Rand* for the respondent.

[Reference was made for the appellants to *Duke of Devonshire* v. *Eglin* (1); *Plimmer* v. *Mayor of Wellington* (2);

(1) (1851) 14 Beav. 530.

(2) 9 App. Cas. 699.

Attorney-General of Southern Nigeria v. *John Holt & Co.* (1); *Ramsden* v. *Dyson* (2); *Llanelly Ry. and Dock Co.* v. *London and North Western Ry. Co.* (3); and *Laird* v. *Birkenhead Ry. Co.* (4) For the respondent reference was made to *Black* v. *The Queen* (5); *Bank of Montreal* v. *The King* (6); *Ontario Mining Co.* v. *Seybold* (7); and to the Railway Act (R. S. Can., 1927, c. 171), ss. 7, 15.]

1931. Feb. 19. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. This appeal was brought against a judgment of the Supreme Court of Canada, which in part dismissed the appellant's appeal, and in part allowed the respondent's appeal from a judgment of the Exchequer Court of Canada in proceedings, in which the Crown, on the information of the Attorney-General of Canada, was plaintiff, and the Canadian Pacific Railway Company (the appellant here) was defendant.

The object of the proceedings was to obtain the removal from the roadway and lands of the Intercolonial Railway of the appellant's line of telegraph poles and wires. The Intercolonial Railway forms part of the Canadian Government Railways system, and its roadway lies in the Provinces of New Brunswick and Nova Scotia.

The appellant's telegraph line was, at the date of the filing of the information (September 15, 1926), substantially all erected upon and carried along the Intercolonial Railway's roadway. The telegraph line forms part of a telegraph system worked by the appellant, and is of undoubted importance both to itself and to the public, inasmuch as it connects with the cable station at Canso, as well as with Halifax and other important points in the Maritime Provinces.

For the purpose of determining the rights of the parties the Supreme Court, in considering the case, divided the appellant's telegraph line into three sections. This appears to their Lordships to be a convenient course, and they propose to adopt it in this judgment. The three sections are as follows :—

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(1) [1914] A. C. 599.

(2) L. R. 1 H. L. 129.

(3) (1875) L. R. 7 H. L. 550, 559, 564.

(4) (1859) John. 500.

(5) (1899) 29 Can. S. C. R. 693.

(6) (1906) 38 Can. S. C. R. 258.

(7) [1903] A. C. 73.

(*a*) The "Main Telegraph Line"—namely, from Coldbrook near St. John through Moncton and Truro to Fairview Junction near Halifax, and from Truro to New Glasgow. This was constructed in the years 1888, 1889 and 1890.

(*b*) The "Branch Telegraph Line"—namely, from New Glasgow to Sydney. This was constructed in 1893, and

(*c*) The "Westville Telegraph Line,"—namely, from Westville to Pictou. This was constructed in 1911.

It will be necessary to consider the circumstances in which each of these sections was constructed, where the poles were placed, and how it came about that eventually substantially the whole system came to be situated on the lands of the Intercolonial Railway. But before doing so it will be advisable to state exactly what were the claims which were put forward by the Crown, and how each Court has dealt with those claims.

According to the information as it was filed and as it stood at the opening of the trial, the Crown's case was that the appellant was from the very start a trespasser in respect of its entire line. No other case was suggested. The allegation ran thus : "(2.) On or before or since the first day of January, 1890, the defendant in or upon the possession of the plaintiff of and in the premises, wrongfully and in violation of the plaintiff's rights, entered and intruded and constructed thereon, a line of poles and wires which the said defendant has ever since operated as part of a telegraph system."

The relief claimed was possession and mesne profits. At the trial leave to amend was asked for and granted, with the result that damages for trespass were claimed as an alternative to the claim for mesne profits, and, as alternative relief, a declaration was sought in the following terms : "(*b*)—(1.) In the alternative a declaration as to the rights, if any, of the defendant in said lands in respect of the said line of poles and wires."

The appellant had pleaded licence either irrevocable or, if revocable, unrevoked, and this no doubt was the reason why it was thought prudent by the Crown's advisers to include a claim for a declaration as to the defendant's rights in the Crown lands, notwithstanding that such a claim would appear to be inconsistent with any claims founded upon trespass. It is, however, true to say that the Crown's primary contention throughout has been, that the appellant was and is a trespasser, and nothing else.

The action was tried by Audette J., and after a hearing which lasted for nine days, the learned judge delivered his judgment on March 21, 1929. By his formal judgment, after making a declaration to the effect that the roadway in question of the Intercolonial Railway was owned by and in the possession of the Crown, he made an order in the following terms: "And this Court doth further order, adjudge and declare that the property of the defendant now on the said lands and premises consisting of a line of telegraph poles erected thereon and carrying wires for telegraph purposes is and has, from the respective dates when the several portions thereof were originally placed theron, been on the said lands and premises with the leave and licence of the plaintiff, but not an irrevocable licence.

"And this Court doth further order that either party to this action have leave to apply, upon notice, for further directions.

"And this Court doth further order and adjudge that the question of costs between the parties be reserved."

The learned judge, it will be observed, drew no distinction in regard to the rights relating to any particular section of the telegraph line. His view of the result of the evidence was, that as regards the whole, the appellant had placed its poles and wires upon the Intercolonial roadway under licence from the Crown, and that such licence remained unrevoked at the date of the judgment.

If this correctly represents, as their Lordships think it does, the judgment of the trial judge, the action was at an end, and nothing remained for decision or discussion except the question of costs.

Both sides appealed to the Supreme Court. The appellant appealed from the judgment, except in so far as it declared that the line of telegraph poles was and had been on the lands with the leave and licence of the Crown, upon the grounds: (1.) That the trial judge was in error in holding that the licence was not irrevocable, and (2.) that on the facts found by him the action should have been dismissed with costs.

The Crown, by way of cross-appeal, asked that instead of the declaration hereinbefore set out, it should be declared that the appellant was throughout a trespasser, or, in the alternative, that if the appellant had any leave or licence, the same had been revoked before the commencement of the action.

On June 11, 1930, the Supreme Court made an order disposing of both appeals in the following terms: "This Court did order and adjudge that as to (1.) the line from St. John to Moncton, from Moncton to Halifax via Truro, and from Truro to New Glasgow, and as to (2.) the line from New Glasgow to Sydney the said appeal should be and the same was dismissed, and the said cross-appeal should be and the same was allowed. And this Court did further order and adjudge that as to the line from Westville to Pictou the said appeal should be and the same was allowed, and the said cross-appeal should be and the same was dismissed." After making certain provisions as to costs the Court further ordered that the case be remitted to the trial judge in order that he might proceed with the trial thereof.

Inasmuch as the Supreme Court allowed the cross-appeal as regards the Main Telegraph Line and the Branch Telegraph Line, the trial of the action would have to proceed in relation to the claims for damages; but it must be pointed out that the order does not indicate upon which footing the cross-appeal succeeded, whether upon the footing that the appellant was a trespasser throughout, or upon the footing that the appellant was a licensee whose licence had been revoked before action. This was obviously a question of the first importance in considering the quantum of damages, and one the answer to which should have been made plain upon the face of the order. Without it the order is incomplete.

Their Lordships, however, gather from a perusal of the language used by the learned judges in the Supreme Court, that the view which there prevailed was that, as regards the Main Telegraph Line, the appellant was a trespasser throughout, but that as regards the Branch Telegraph Line, the appellant "was at the beginning of this action in no better position than that of a licensee whose leave was terminated or exhausted." In relation to these two sections of the telegraph line the five judges were unanimous. So far as concerns the Westville Telegraph Line, there was also unanimity in the view that the appellant was not a trespasser throughout, but had originally placed the telegraph line on the roadway under licence from the Crown. The Chief Justice of Canada, however, was of opinion that the bringing of the action of itself determined the licence. The other members of the Court (Duff, Newcombe, Rinfret and Lamont JJ.) considered that the licence had not been revoked.

Their Lordships now proceed to consider the facts disclosed by the evidence in relation to each of the three sections of the appellant's telegraph line.

(*a*) *The Main Telegraph Line.*

This section of the appellant's telegraph line was constructed in the years 1888–90. [The judgment having stated the facts as to the original construction of the Main Telegraph Line and its maintenance down to 1905, including correspondence which passed between the appellants and the representatives of the Crown, then proceeded as follows:]

This statement covers the relevant facts relating to the original construction of the Main Telegraph Line, and its maintenance down to the year 1905, when its rebuilding began. They may fairly be summed up by saying that while leave to erect the line on Crown property had been refused, the appellant had succeeded in placing a relatively small number of poles on Crown property, some with leave and some without.

In 1905 the rebuilding began, the first portion to be rebuilt being the section between Truro and Fairview Junction. Other sections were rebuilt from time to time, with the result that the whole of the Main Telegraph Line was reconstructed with all its poles, or substantially all its poles, set upon the Intercolonial roadway and property. With the exception of the section between Sussex and Moncton, this had been accomplished by 1914.

It was argued before their Lordships that in so acting the appellant had the consent of the Crown by virtue of Sir John Macdonald's letter of October 9, 1890. Their Lordships are unable to accept this contention; neither it, nor the Dwight correspondence, can properly be stretched to cover more than what was actually being discussed and dealt with at the time—namely, the question whether the "few poles" which had then been erected on the Intercolonial roadway should or should not be permitted to remain.

The evidence and documents in relation to the Main Telegraph Line appear to their Lordships to show that (with certain exceptions as to small portions thereof) it was, as it now stands, established on Intercolonial property, without any leave or licence from the Crown, and that the appellant was at the time of such establishment a trespasser in respect thereof.

There remains, however, the question whether at the date of suit the appellant was a trespasser. The suit was not instituted until 1926. In the meanwhile discussion had arisen and correspondence was exchanged between the appellant's manager, Mr. McMillan, and Mr. Gutelius, the general manager of Government railways, in regard to a proposed agreement as to the terms of payment for transport along the railway of material and men for repairing the appellant's telegraph line. In the course of this correspondence Mr. Gutelius wrote on October 31, 1916, to Mr. McMillan a letter in which occurs the following passage: "I find upon investigation that the Canadian Pacific Railway

Telegraphs are trespassers with their poles on the right of way of the Canadian Government Railways to the extent of 452 miles. We feel therefore that effective at once you should pay a reasonable rental for this pole privilege by the execution of an agreement, which among other things, should cover the transportation of your linemen and workmen, the movement of construction trains and the joint use of such stations as St. John."

Mr. McMillan denied the suggestion of trespass, alleging permission from the Minister of Railways. In June, 1917, Mr. Gutelius resigned, and Mr. Hayes was appointed general manager of the Canadian Government Railways, east of the River St. Lawrence.

In July, 1917, the matter was taken up between Mr. McMillan and Mr. Hayes. On August 3, 1917, Mr. Hayes wrote to Mr. McMillan, stating the effect of a discussion which he had had with Mr. Pottinger and adding : " The foregoing may take your company out of the class of trespassers on the railway property, but I cannot see it at all relieves you of paying reasonable compensation for the privilege you enjoy. As the draft agreement that has been prepared does not seem to provide for these railways a sufficient consideration for the privileges you enjoy we shall be obliged to review and submit a revised proposition for your consideration."

A revised draft agreement was submitted and discussed for some months, but no agreement was ever completed. Accounts were sent to the appellant from time to time claiming pole rent, but these were never paid. The matter seems to have rested for six or seven years, until March 20, 1924, when Mr. Edwards (representing the Department of Justice of Canada) wrote to Mr. Beatty, the appellant's president, the following letter : " I have been instructed by the Department of Railways and Canals to take up with you the question of certain lines of telegraph wires and poles belonging to you which are situate on the lands of the Canadian Government Railway, and which lines extend from the City of St. John to the City of Halifax ; from Truro to Sydney, and from Painsec Junction to Point du Chene. I am instructed to inform you that all offers of settlement or otherwise, heretofore made to the Canadian Pacific Railway Company or to the Canadian Pacific Telegraph Company by the Government, or any one on its behalf are withdrawn and to say that the wires and poles must be removed from off the Government Railways' lands, and that otherwise the said poles and wires will be removed. No time has been fixed within which you must effect this removal, but unless you agree to act at once in the matter, a date will be fixed by the Department of Railways and Canals."

Some further negotiations took place, but without result, and on January 29, 1926, Mr. Edwards wrote to appellant's solicitor the following letter: "Referring to previous correspondence with regard to the demand of the Department of Railways and Canals that the lines of telegraph wires and poles operated by your company on the lands of the Canadian Government Railways be removed therefrom, or satisfactory arrangements made with the department for the rental thereof, I understand that certain negotiations have taken place between officials of your company and of the Government, but that it has not been found possible to reach an agreement, and I am instructed therefore to inform you that it is the intention of the department to at once proceed with the action outlined in my letter to Mr. Beatty of the 20th March, 1924."

On September 15, 1926, the present proceedings were instituted.

From a consideration of the foregoing facts their Lordships draw the following conclusions as regards the section under consideration: (1.) That although the placing of the poles upon the Intercolonial roadway was originally a trespass by the appellant, the poles have remained upon the roadway for long periods of years; (2.) that the fact that substantially all the appellant's poles were on Intercolonial property must have been known to those who represented the Intercolonial Railway and whose duty it was to report the fact to their principals; (3.) that for many years before action was brought the appellant's telegraph poles must be treated as being on the Intercolonial roadway with the leave and licence of the Crown; and (4.) that consequently (subject to the question of revocation) the appellant was not at the date of suit a trespasser.

While their Lordships are in agreement with the view entertained by the Supreme Court that the rebuilding of the telegraph line upon the Intercolonial roadway was a trespass by the appellant, they feel unable to accept the view that the appellant was a trespasser at the date of suit. The length of time during which the occupation by the appellant was known to and acquiesced in by the Crown, and in respect of which it was claiming to be paid rent, is ignored in the judgment of the Supreme Court. In their Lordships' view the Crown's knowledge, acquiescence and claim indicated above are destructive of the view that the appellant was a trespasser at the date of suit. Their Lordships are of opinion in regard to the Main Telegraphic Line, that before the institution of the suit the appellant's telegraph poles and wires were on the property of the Intercolonial Railway with the leave and licence of the Crown.

For the moment is reserved the consideration of the questions: (i.) Whether such licence was revocable or not; (ii.) Whether, if revocable, it had been revoked before action or by the institution of the proceedings; and (iii.) If revocable but unrevoked, how and in what circumstances the licence is revocable.

These questions can most conveniently be considered in relation to the whole telegraph line, after the special facts regarding the other two sections have been dealt with. This their Lordships now proceed to do.

(b) *The Branch Telegraph Line.*

This section was constructed in 1893. There had been in 1887 and 1888 some correspondence with the Government Railways when the railway between the Straits of Canso and Sydney was being built, and in March, 1893, the appellants, through Mr. Hosmer, returned to the charge, and applied to the Department of Railways and Canals for permission to build the contemplated telegraph line along the Intercolonial roadway between New Glasgow and Sydney. Mr. Schreiber replied on March 10, 1893: "There will be no difficulty about this, but it will be necessary for you to enter into a written agreement similar to the Western Union Telegraph Company." Mr. Hosmer, in answer, thanked him for his letter, and asked that the necessary contract be prepared.

A contract was prepared and agreed between the parties. It was executed by the appellant, as appears by a letter from the appellant's secretary to the Secretary of the Department of Railways and Canals, dated July 25, 1893, which runs thus: "I beg to enclose agreement in duplicate, executed by this company providing for the construction of a telegraph line on the Intercolonial Railway between New Glasgow and Sydney. Will you please return one copy to me when executed by the Minister of Railways."

There is no proof that the agreement was ever executed so as to bind the Crown. However that may be, this section of the appellant's telegraph line was constructed along the Intercolonial roadway. Further, we are left in the dark as to the terms of the document which had been executed by the appellant, for it seems to have disappeared with other documents in a fire, and no copy or draft is forthcoming.

The agreement with the Western Union Telegraph Company is in evidence. It is dated October 16, 1889. Its duration was for a term of twenty years from July 1, 1889, and thereafter until the expiration of one year after written notice should have been given, after the close of the said term, by either party to the other of an intention to terminate the same.

It contained a clause (clause 25) which ran thus: "When this agreement expires, either by lapse of time or pursuant to notice terminating this contract as in the preceding clause stated, the company shall not be required to remove its poles and wires erected under this agreement from the railway property, but all other rights herein granted shall thereupon cease and determine."

It was contended by the appellant that in some way the rights of the parties as to this section were to be determined upon the footing that the provisions of the Western Union agreement applied mutatis mutandis, and that by virtue of clause 25 the appellant was secured in the permanent enjoyment of the poles and wires upon the railway property as part of an operative telegraph system.

Their Lordships are unable to accept this view. The stipulation for "a written agreement similar to the Western Union Telegraph Company," means no more than that the parties were to negotiate on the lines of that document. Even if the stipulation meant that a clause identical with clause 25 was to apply, their Lordships would feel unable to extract from it the permanent rights which the appellant claims.

The true position in regard to this section of the appellant's telegraph line would appear to be this: The appellant had, in strictness, no right to place the telegraph line upon any part of the Intercolonial roadway before the stipulated agreement had been agreed upon, and executed by the parties. Nevertheless, the appellant did enter upon and occupy the roadway by means of the telegraph line. This action must, their Lordships think, be treated as having taken place with the leave and licence of the Crown, upon the footing that an agreement would be executed by the parties and in anticipation thereof. It being impossible to establish either that an agreement binding the Crown was executed, or (if any was executed) what were its terms, the appellant's occupation must, their Lordships think, be treated as continuing to be only that of a licensee.

(c) *The Westville Telegraph Line.*

This section, which is only some 10 miles in length, was built in 1911.

On March 20, 1911, Mr. McNicoll, the appellant's general manager, wrote to Mr. Pottinger, then assistant chairman of the Intercolonial Railway, the following letter: "I understand that Mr. E. M. Macdonald, M.P., has been in communication with you with regard to giving us right of way for building telegraph line from Truro to Pictou Junction, and that you have decided to grant us this permit on an agreement to be executed by us. Will you kindly confirm this and let me have draft of agreement so that I may arrange for the building of the line."

To this Mr. Pottinger replied on April 7, 1911: "I duly received your letter dated March 20, with reference to building a telegraph line from Truro to Pictou Junction. What was asked by your telegraph officials was for right of way to build a line from Westville Station to Pictou, a distance of 10.59 miles. As I told you verbally when in Montreal it will be all right for you to go on and build this line, and we will arrange about the agreement at a later period. Instructions have been given to our track department to permit the building of the line. There is a long trestle bridge over a portion of Pictou Harbour, and there the wires will have to be attached to the bridge. The position of the poles of the telegraph line on the land and the position of the wires on the bridge can be arranged between the telegraph officials and our roadmaster. There is a telegraph line of the Western Union Telegraph Co. along that part of the railway, and your line of course will be placed so as not to interfere with the Western Union line."

No agreement was ever negotiated, but the appellant proceeded with the construction of the telegraph line and erected it upon the Intercolonial roadway.

As regards this section it appears to their Lordships that the appellant was allowed to enter and construct the telegraph line upon Crown property pending negotiations which would result in an agreement defining the rights and liabilities of the parties. In these circumstances it is impossible to treat the appellant as having entered as a trespasser. The appellant entered, and continued to be there by leave and licence of the Crown.

Their Lordships are accordingly of opinion that the correct view to be taken, as a result of the evidence, is that as regards all three sections of the telegraph line the appellant was,

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before action brought, in occupation by leave and licence of the Crown.

There remain for consideration the three further questions hereinbefore set forth, and with these their Lordships will now proceed to deal.

(i.) Was the licence, under which the appellant was in occupation of Crown land, revocable ?

Various arguments in favour of irrevocability were presented to the Board. One, having special reference to the Branch Telegraph Line and the effect of clause 25 of the Western Union agreement, has already been dealt with.

Others were of general application to all three sections of the telegraph line.

It was said that the Crown encouraged the appellant to build the telegraph line upon Crown property, and that thereby the appellant acquired the right to keep the telegraph line there and use it in perpetuity. In support of this proposition reliance was placed on the case of *Plimmer* v. *Mayor of Wellington.* (1)

As their Lordships understand that decision, it was based on contract inferred to have been made between Plimmer and the Government. As pointed out in the judgment, Plimmer in erecting his original works on Government land with Government permission, became an occupant of the land under a revocable licence. Later, by virtue of transactions for the mutual benefit of both sides, from which the Board drew the inference of a contract, Plimmer's right to occupy ceased to be revocable and became a perpetual right to occupy and use the land in question for the purposes of a jetty.

In the present case the facts appear to be very different. As regards the Main Telegraph Line there was no encouragement and no mutual arrangement of any kind. There was nothing but original trespass, which, by dint of toleration over a period of time, became an occupation by leave and licence. As regards the other two sections of the telegraph line, the original occupation was permitted by the Crown, but only upon the footing that the rights of the parties would

(1) 9 App. Cas. 699.

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be defined by agreement thereafter to be negotiated. Unless and until such agreements had been negotiated and had become binding, the occupation continued by leave and licence only, and the appellant must be taken to have erected the telegraph line subject to the risk of the permission being withdrawn if no agreement was effected.

In their Lordships' view *Plimmer's* case (1) is far removed in its facts from the present case, and is of no assistance to the appellant.

It was further contended that the Crown was precluded from revoking the licence by reason of some equitable doctrine, which it was alleged was applicable to the case. The doctrine was not very clearly defined, but reference was made to *Ramsden* v. *Dyson.* (2) In the course of the judgments in that case instances are given in which equity will intervene in favour of a litigant as against the legal owner of land. One such (see per Lord Cranworth (3)) is the case where A. builds on land which he thinks is his, but is really B.'s, and B., knowing of A.'s mistake, encourages A. to build either directly or by abstaining from asserting his legal right. In such a case equity will intervene for the protection of A. This, their Lordships understand to have been the equitable doctrine which was invoked by the appellant. It is a doctrine which is sometimes alluded to under the name of "equitable estoppel." Whether there can be any estoppel which is equitable as distinct from legal and whether "equitable estoppel" is an accurate phrase, their Lordships do not pause to inquire. The foundation upon which reposes the right of equity to intervene is either contract or the existence of some fact which the legal owner is estopped from denying. Thus in the case put, B.'s conduct is such that from it may be inferred a contract by B. not to disturb A. in the possession of the land, or it may amount to a statement by B. that the land is A.'s, upon the faith of which A. has acted and built.

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(1) 9 App. Cas. 699.
(2) L. R. 1 H. L. 129.
(3) L. R. 1 H. L. 140, 141.

Reference may properly be made to a case before this Board (*Lala Beni Ram* v. *Kundun Lall* (1)), in which the necessity for contract as a basis for this intervention of equity is made clear. In that case tenants of land had successfully resisted ejectment after the determination of their lease, upon the ground that the landowners by standing by and allowing buildings to be erected on the land by the tenants, were estopped from ejecting the tenants. On appeal from the High Court of Allahabad this Board was of opinion that the judgments appealed from should be reversed and ejectment decreed. In the view of the Board in order to raise the estoppel which the Courts below had enforced against the owner of the land, "It was incumbent upon the respondents to show that the conduct of the owners, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation."

Upon the facts of the present case their Lordships can find no foundation for the application of any equitable doctrine in favour of the appellant. There was no mistaken belief by the appellant as to the ownership of or the rights over the Intercolonial property, still less was there any such mistaken belief, which was known to the Crown. There was no conduct on the part of the Crown which induced the appellant to build in the belief that rights in perpetuity would be acquired. There was nothing upon which to ground any estoppel. The facts are all the other way. As already stated, the Main Telegraph Line came on the roadway by way of trespass, the other two sections came there upon the footing that the rights would be subject to and would be defined by written agreements to be negotiated between the parties.

Their Lordships are of opinion that the appellant's claim that the licence is irrevocable fails, and that the Crown was at liberty to revoke the licence, and so to put an end to the continued existence of the appellant's telegraph line upon the Crown property.

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(1) L. R. 26 I. A. 58.

(ii.) Was the licence revoked before action or by the institution of proceedings ?

So far as concerns the alleged revocation before action, this depends upon the construction to be placed upon two documents—namely, the two letters from Mr. Edwards, which are dated March 20, 1924, and January 29, 1926, and which have already been quoted in full. The first mentioned letter (which does not in terms cover the Westville Telegraph Line) does not, in their Lordships' view, purport to determine the licence. At most it amounts to an intimation that a date will in the future be fixed for the removal of the telegraph line—i.e., it is an intimation that the licence will be put an end to at some future time. The second letter appears to carry the matter no further, as a determination of the licence. The alternative which is mentioned in the opening sentence confirms the view that the first letter was not intended to be a notice determining the licence. All that the second letter does is to state the intention of the department at once to proceed with the action outlined in the first letter —namely, fix a date. No date was ever fixed.

In these circumstances their Lordships are of opinion that the licence had not been determined before action brought.

The question next arises whether the institution of the proceedings ipso facto determined the licence. The majority of the Supreme Court apparently thought not, because as regards the Westville Telegraph Line (which is included in the information) their decision was based upon the view that the Crown had no cause of action when the information was filed. The Chief Justice of Canada thought otherwise. The point does not appear to have been taken before the trial judge ; at all events it is not referred to in his judgment. Neither is the point taken in the respondent's factum before the Supreme Court.

The determination of this point involves the consideration of the third question—namely :—

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(iii.) If the licence is revocable but unrevoked, how and in what circumstances the licence is revocable?

Whether any and what restrictions exist on the power of a licensor to determine a revocable licence must, their Lordships think, depend upon the circumstances of each case. The general proposition would appear to be that a licensee whose licence is revocable is entitled to reasonable notice of revocation. For this proposition reference may be made to *Cornish* v. *Stubbs* (1) and *Mellor* v. *Watkins* (2), in the latter of which cases Blackburn J. states that a person giving a revocable licence "is bound to give the licensee reasonable notice."

When the exercise of the rights conferred by the licence involves nothing beyond, there can be no reason to urge against the existence of a power to determine the licence brevi manu at the will of the licensor.

But the exercise of the rights may have involved the licensee in obligations in other directions, which the determination of the licence would disable him from fulfilling, unless the licence were determined after a notice sufficient, in point of time, for the making of substituted arrangements. In such circumstances the licensee would, their Lordships conceive, be entitled to breathing space sufficient for this purpose. The case before the Board would appear to be peculiarly a case in which grave injustice might ensue if the Crown were at liberty by the mere initiation of legal proceedings to determine summarily the rights of the appellant, and turn the appellant's occupancy into trespass. For the appellant is not the only one concerned; the telegraph line is part of a system in the existence and continuance of which the public has a very considerable interest. It appears to their Lordships that this is a case in which the licence can only be effectively ended, after notice has been served upon the appellant determining the licence on such a specified date in the future, as will give the appellant an interval of time between the service of the notice and the specified date, sufficient not only to allow the removal of the poles and

(1) (1870) L. R. 5 C. P. 334.

(2) (1874) L. R. 9 Q. B. 400.

wires from off the property of the Crown, but also to enable the appellant to make arrangements for the continuance of the telegraph line by the erection of poles and wires elsewhere than on Crown property. Their Lordships are accordingly of opinion that the appellant's licence was not determined by the institution of the proceedings.

In the result therefore the position is, that the appellant is in occupation as a licensee whose licence is revocable, but unrevoked. Inasmuch as the Crown, by amendment, asked for a declaration of the appellant's rights, a proper declaration of those rights should be made; but in all other respects the action fails and is at an end. There is nothing left to try.

Their Lordships feel little doubt that as between the Canadian Pacific Railway Company and the Crown suitable contractual arrangements will be made which will obviate further litigation. If, however, this anticipation proves to be ill-founded, it will be for the Crown to determine the licence by service of a notice the sufficiency of which, if called in question, will have to be decided, upon proper evidence, in subsequent proceedings. It will be for the Crown, at its risk, to fix the length of notice.

Inasmuch as their Lordships are of opinion that no irrevocable licence exists, and that no permanent interest was vested in the appellant, other points raised by Mr. Rowell in his careful argument for the Crown, do not appear to call for comment or decision.

The result of the appeal may now be stated. It succeeds in part and fails in part. It succeeds in so far as it has established that the appellant is not at the present time a trespasser in respect of any section of the telegraph line; but it fails in so far as it sought to establish that as regards the whole telegraph line the licence was irrevocable. Neither the order of the Supreme Court nor the order of the trial judge can stand. The order of the Supreme Court should be discharged and the order made by the trial judge should be varied as hereafter indicated.

As regards costs their Lordships feel that although the action has been fruitful to the extent of a declaration defining the

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appellant's rights, yet the main costs of the trial were incurred in relation to the Crown's principal contention—namely, that the appellant was and always had been, a trespasser. Upon that issue the Crown has failed. Their Lordships think that justice will be done by ordering the Crown to pay four-fifths of the appellant's costs of the action. As regards the costs of the appeal to the Supreme Court and before the Board, their Lordships are impressed by the fact that the appellant's primary claim, which necessarily occupied much of the argument, was for a right in perpetuity, and that this claim has failed. They are of opinion that there should be no costs of the appeals to the Supreme Court or of the appeal here.

For the reasons above appearing their Lordships are of opinion that the order of the Supreme Court should be discharged, and the order of the trial judge varied in manner following: (1.) By omitting from the second declaration the words "and has from the respective dates when the several portions thereof were originally placed thereon been"; (2.) by omitting the last two paragraphs thereof; and (3.) by ordering that the plaintiff do pay to the defendant four-fifths of the defendant's costs of action to be taxed. There will be no costs of the appeals to the Supreme Court or of the appeal before this Board. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

CARLING EXPORT BREWING AND MALTING COMPANY, LIMITED . . } APPELLANTS;

AND

THE KING (ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR CANADA) . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada — Revenue — Excise — Gallonage and Sales Taxes — Exemptions — Exported Goods — Absence of Regulations by Minister — Violation of foreign Law — Beer exported to U. S. A. — Special War Revenue Act, 1915 (5 *Geo.* 5, *c.* 8, *as amended*), *ss.* 19B, 19B B B.

The Special War Revenue Act, 1915, of Canada, as amended by later statutes, imposes gallonage tax and the sales tax upon specified goods, including beer, manufactured in Canada. It is provided, however, that gallonage tax shall not be payable "when such goods are manufactured for export under regulations prescribed by the Minister of Customs and Excise" and that sales tax shall not be payable on "goods exported," with a provision for a refund on "domestic goods exported under regulations" similarly prescribed:—

Held, that the exemption from gallonage tax, like that from sales tax, applied only to goods actually exported, and that it operated although no regulations had been prescribed; and that an export of beer to the U. S. A. was within the exempting provisions although the import was contrary to the law of that country.

Held, further, that beer sold to a purchaser in the U. S. A. was within the exemptions where it had been consigned to him at a Canadian port, and was proved to have been shipped from there into the U. S. A. in smaller consignments, mostly to sub-purchasers.

As to the absence of regulations *Dominion Press* v. *Minister of Customs and Excise* [1928] A. C. 340 distinguished.

Judgment of the Supreme Court of Canada [1930] S. C. R. 361 reversed.

APPEAL (No. 104 of 1930) by special leave from a judgment of the Supreme Court of Canada (February 4, 1930) reversing a judgment of the Exchequer Court (April 29, 1929).

The Crown proceeded against the appellants in the Exchequer Court of Canada to recover large sums in respect of gallonage and sales taxes levied by the Special War Revenue Act, 1915, of Canada, and amendments thereto, in respect of beer manufactured and sold by the appellants between April 1, 1924, and May 1, 1927; interest and penalties also were claimed. The appellants claimed exemptions from tax under statutory provisions on the ground that the beer had been manufactured for export, and exported to the United States of America.

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

The trial judge (Audette J.) dismissed the claim of the Crown in respect of about 83 per cent. of the tax claimed, but gave judgment for the balance, with interest and penalties on that basis.

On an appeal and cross-appeal to the Supreme Court of Canada judgment was given for the whole sum claimed. The judgment of the Court, delivered by Duff J., held that the exemption in the case of gallonage tax did not operate in the absence of regulations made by the Minister, and that there had been no such export as entitled the appellants to exemption from sales tax. The proceedings on appeal are reported at [1930] S. C. R. 361.

The material facts and statutory provisions appear from the judgment of the Judicial Committee.

1930. Dec. 12, 15, 16, 18, 19. *Tilley K.C.*, *J. H. Clark* and *C. F. H. Carson* for the appellants.

Rowell K.C. and *G. C. Lindsay* for the respondent.

1931. Feb. 19. The judgment of their Lordships was delivered by

Lord Thankerton. The appellant, who carries on a brewery at London, Ontario, is sued by the Crown in the present action for the recovery of (*a*) $260,662.21 gallonage tax under the provisions of the Special War Revenue Act, 1915 (5 Geo. 5, c. 8), and amendments thereto, in respect of beer manufactured and sold by the appellant between April 1, 1924, and May 1, 1927; (*b*) $163,828.07 for sales tax under the said statute and amendments in respect of beer sold by the appellant between the same dates; and (*c*) interest and penalties in respect thereof.

The appellant, in defence, claims the benefit of certain statutory exemptions in favour of goods exported, and the main issue between the parties raises important questions of construction of the statutory provisions as to exemption, as also a question of fact whether the dealings with the goods in question were such as to entitle them to the benefit of the exemptions. There is also a minor question as to the amount of the statutory penalties.

In the Exchequer Court of Canada, Audette J., who tried the case, on April 29, 1929, dismissed the claim of the Crown in respect of about 83 per cent. of the claim, but gave judgment in favour of the Crown for the balance, with interest and penalties on the basis contended for by the appellant.

On an appeal by the Crown and a cross-appeal by the present appellant, the Supreme Court of Canada, on February 4, 1930, gave judgment in favour of the Crown for the whole sums claimed, with interest and penalties as claimed, and dismissed the cross-appeal. It is from this judgment that the present appeal is taken. The appeal relates only to the 83 per cent. of the Crown's claim, except as regards the amount of the penalties, the question in regard to which affects the whole claim.

The provisions as to gallonage tax, which may be conveniently considered first, are contained in s. 19B, sub-s. 1, of the Special War Revenue Act, 1915, as amended by 12–13 Geo. 5, c. 47, s. 14, and, so far as material, are as follows :—

(*b*) " There shall be imposed, levied, and collected upon all goods enumerated in schedule II. to this Part, when such goods are imported into Canada or taken out of warehouse or when any such goods are manufactured or produced in Canada and sold on and after May 24, 1922, in addition to any duty or tax that may be payable under this Act, or any other statute or law, the rate of excise tax set opposite to each item in said schedule II.

(*c*) Where the goods are imported such excise tax shall be paid by the importer and where the goods are manufactured or produced and sold in Canada, such excise tax shall be paid by the manufacturer or producer ; provided that if an

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automobile is, on May 24, 1922, in the hands of a dealer and not sold to a bona fide user, the tax shall be paid by such dealer when such automobile is sold.

(*d*) The Minister may require every manufacturer or producer to take out an annual licence for the purposes aforesaid, and may describe a fee therefor, not exceeding two dollars, and the penalty for neglect or refusal shall be a sum not exceeding one thousand dollars. Provided that such excise tax shall not be payable when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise.

Schedule II.—Ale, beer, porter and stout, per gallon, twelve and one-half cents."

As regards this tax the Supreme Court upheld the contention of the Crown that no regulations had been made by the Minister under the proviso, and that in the absence of such regulations the proviso could have no operation, and based their decision on a comparison of other somewhat similar provisions in the statute and the decision of this Board in *Dominion Press* v. *Minister of Customs and Excise.* (1)

The appellant challenges this decision of the Supreme Court, and maintains that the existence of regulations is not a condition precedent to the operation of the exemption, and that the proviso merely empowers the Minister to make regulations, if he finds them expedient, for the protection of the revenue and to ensure that the benefit shall only be secured in respect of goods which are, in fact, manufactured for export. He further maintains that in fact there were regulations in operation during the material period which were applicable to the proviso.

In their Lordships' opinion it is not to be readily assumed, in a taxing Act, that Parliament has delegated to a Minister the power to settle the limits of taxation, and such intention must be clearly shown by the terms of the statutory provision. A good example of such clear expression is to be found in the *Dominion Press* case (1), which related to a statutory proviso that the taxes should not be payable " on goods exported or

(1) [1928] A. C. 340.

on sales of goods made to the order of each individual customer by a business which sells exclusively by retail under regulations by the Minister of Customs and Excise, who shall be the sole judge as to the classification of a business." It is obvious that no business could claim to be one of the class on which the benefit of exception was conferred unless and until the Minister had placed the business within the class. Their Lordships are unable to find any similar clear expression in the present case, where, at the best for the Crown's case, the words may be said to be ambiguous, as they also appear to be in the somewhat similar provision in s. 16A, sub-s. 5. In s. 19BB, sub-s. 1 (*b*) and (*e*), the provision as to regulations appears to apply only to accounting. These are the three similar provisions in the statute referred to by the Supreme Court as supporting the construction maintained for the Crown. Accordingly their Lordships are unable to agree with the conclusion of the Supreme Court on this point, and are of opinion that the proviso merely empowers the Minister to make regulations if he deems it expedient, but that the absence of such regulations does not render the statutory exemption nugatory. Further, this view seems to be more in harmony with the general scheme of the statute, which appears to exclude trade to other countries from the area of taxation. This view renders it unnecessary to consider the somewhat doubtful alternative argument of the appellant that there were, in fact, such regulations in operation.

The construction of the words "when such goods are manufactured for export" in the proviso to s. 19B, sub-s. 1, next falls to be considered. It may be first noted that "such goods" means the goods enumerated in schedule I., which relates to automobiles, and in schedule II., which relates to cigars and carbonic acid gas as well as to ale, beer, porter and stout, and that the proviso applies to export to any country outside Canada. Their Lordships are clearly of opinion that the existence of prohibitive legislation as regards ale, beer, etc., in a particular country of export can have no relevance to the general construction of the proviso, and they are unable to accept the argument of the Crown on this point, in support of which Mr. Rowell cited the case of *Foster* v. *Driscoll* (1), as to the soundness of which and of the opinions expressed therein their Lordships find it unnecessary to express any opinion in this case.

On the other hand, the prohibition laws of the United States may have a bearing on the question of fact in this case, as to whether the goods are proved to have been exported to that country.

On the question of construction their Lordships are of opinion that the words used necessarily imply not only, as the bare words might suggest, that the goods are manufactured and sold with an intention of export, but that they must, in fact, have been exported before the benefit of the exemption can be obtained. The tax is imposed "where goods are manufactured or produced and sold in Canada," and the words "and sold" must be held to be implied in the proviso, though not repeated there. It is a possible view that subsequent export of the same goods by a purchaser, quite independently of the manufacturer, would sufficiently comply with the terms of the proviso, but their Lordships prefer the view that the tax being levied on sale by the manufacturer, it is for the latter, in claiming exemption, to prove that under the arrangement for sale the goods were to be exported, and that he secured that that condition was in fact carried out.

In their Lordships' opinion, a similar construction applies in the case of the consumption or sales tax, which is imposed by s. 19BBB, sub-s. 1, of the same statute, as amended, the relevant provisions of which are as follows:—

"In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of five per cent., on the sale price of all goods produced or manufactured in Canada, including the amount of excise duties when the goods are sold in bond, which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him; and in the case of imported goods, the like tax upon the duty paid value of the goods imported payable by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption.

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(1) [1929] 1 K. B. 470.

For the purpose of calculating the amount of the consumption or sales tax, ' sale price ' shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto.

Provided that the consumption or sales tax specified in this section shall not be payable on goods exported ; . . . ."

In the case of this tax there is provision for a refund under sub-s. 10 : " A refund of the consumption or sales tax may be granted on imported goods on which customs duties have been refunded on exportation ; and a refund of the same tax may be granted on domestic goods exported, under regulations prescribed by the Minister of Customs and Excise." This, however, will apply to goods which, though not manufactured for export in the sense above described, are subsequently exported.

Accordingly, their Lordships are of opinion that the appellant is entitled to exemption from both gallonage and sales taxes in respect of the 83 per cent. of the goods in question if it is established (*a*) that the goods were sold under the arrangement that they were to be exported, and (*b*) that the appellant saw to it that they were so exported.

The appellant company acquired the brewery at London, Ontario, in 1923 ; the brewery, which had an ale plant, had been closed down for some years, and the appellant changed the plant to a lager beer plant—though the ale plant was retained—and started brewing in April, 1924. The shareholders of the appellant company were the witness Harry Low and his wife, Mr. and Mrs. Leon and Mr. Burns ; throughout the period here in question Low was vice-president of the company and export sales manager at Windsor, Ontario, on the Canadian border. Generally speaking, the Canadian market was an ale market, while the United States market was a market for lager beer made either from malt or rice. The 83 per cent. of the beer manufactured and sold in respect of which the Crown claims and with which alone we are now concerned, was all either malt lager or rice lager.

During the material period, from April 1, 1924, to May 1, 1927, the appellant company had an agreement first with one Grandi until October, 1925, and thereafter with one Savard, that they should take the company's whole output of beer for export to the United States. Both Grandi and Savard resided in Detroit, Michigan, U. S. A., and the beer was put on rail at London, consigned to them at Windsor or one of the adjacent ports on the Canadian border. In their Lordships' opinion, it is proved that the beer was manufactured and sold under an arrangement with Grandi and thereafter with Savard, that it was to be exported to the United States, but the further question as to whether the appellant saw that the goods were in fact exported involves a more critical consideration of the evidence.

According to the orders received, consignments of beer were put on rail at London for delivery at a port on the river front, where they were either shipped on small boats or warehoused at the dock until boats were ready for their shipment; the warehousing and shipment was supervised by Low or a representative of his at the particular dock. In the large majority of cases, the boats were receiving the goods in fulfilment of sub-sales made by the purchaser from the appellant company; in some few cases the shipment was on behalf of Grandi or Savard themselves. It is admitted that these sub-sales were arranged and the price—generally an advanced one—was fixed by Grandi or Savard independently of the appellant. Boats acting on behalf of sub-purchasers were required to pay the purchase price on shipment of the goods; in the case of Grandi or Savard credit was usually given. Any moneys so received were paid into a bank account in the name of the appellant company at Windsor, to which reference will be made later. The railway freight was paid by the appellant at London; the expenses of handling and warehousing at the riverside were paid by the purchaser.

The bank account in the appellant's name, on which Low had authority to draw, was opened on May 12, 1924, and continued in operation during the rest of the period, and the appellant company at London drew from time to time on it for the invoice price of the goods delivered, which during the Grandi period was the current market rate in Canada, and during the Savard period was a fixed price, commencing at 1.75 per case and being later varied by agreement. In their Lordships' opinion, the apparently abortive agreement with Fitzgerald of May, 1925, and the agreement with the Bermuda Export Company of June, 1926, with a view to stabilization of prices, do not materially affect the matter. During the Grandi period the balance of the moneys paid into this bank account, after deduction of the invoice prices, was accounted for to Grandi by Low, after deduction of the expenses which he had paid on Grandi's behalf. During the Savard period Low, as an individual, had an agreement with him under which the balance of the prices received from the sub-purchasers, after deduction of the appellant's invoice price and the expenses paid by Low on behalf of the purchaser, was divided between him and Savard. To enable him to pay the purchaser's expenses at the riverside Low opened a bank account known as the "Harry Low Special Account," which he financed by drawing on the appellant's account. Soon after the beginning of this agreement with Savard, Low began to divide his share of the profits with Leon and Burns, who along with him were the real proprietors of the appellant company.

But the most important evidence is to be found in the documents relating to these consignments of beer. On the dispatch of each consignment from London it was accompanied by an invoice, bills of lading and Customs forms known as "B.13s," examples of which are printed in the record. Some time in the early part of 1926 a note began to be printed on the bill of lading to the effect that if the goods were for export from Canada, delivery should only be given by the railway company under supervision of the collector of customs, and thereafter the unloading at the riverside took place in the presence of a customs officer. Prior to March, 1926, the "B.13s" bore a certificate by the appellant company that the goods were delivered for exportation to the U. S. A., and it was the practice at the riverside to split up the bulk consignments into small parcels to suit the capacity of the river boats and to alter the "B.13s" accordingly; in these latter forms the appellant company certified that the particular parcel was being delivered by them to the particular boat for exportation to the U. S. A., and they were presented to and stamped by the customs officer at the port of exit. In accordance with a circular of the Customs and Excise Department dated March 13, 1926, this practice was altered, and the "B.13s" were made out at London in a variety of denominations from five cases upwards and the appropriate quantity was sent with each consignment, so that, without alteration of them, the consignment could be divided into small parcels at the riverside. Further, instead of a certificate, the "B.13s" was sworn to by the appellant company or its attorney.

On shipment on board the boat, a report outwards was signed by the master, which stated the appellant to be the shipper of the goods and a port in the U. S. A. as the destination, and on this report a clearance certificate was granted by the customs officer at the port of exit. The boats which made these shipments were all registered in U. S. A. ports. There is no evidence that any of these goods were landed again in Canada.

In these circumstances, their Lordships are of opinion that the appellant has sufficiently proved that the goods were, in fact, exported. In their opinion, it is sufficient that the "B.13s" correspond in bulk with the total amount of the consignments included in the 83 per cent., there having been no "B.13s" for the consignments included in the 17 per cent., and that the appellant is not bound to prove the individual history of each consignment. Further, they are of opinion that the supervision of Low at the riverside up to the shipment of the goods on board the boats, along with the documentary evidence, sufficiently proves that the appellant company saw that the arrangement for export to the U. S. A. was, in fact, carried out.

Accordingly their Lordships are of opinion that the appellant company has established its claim to exemption from both taxes as regards the 83 per cent. of the goods in question.

As to the 17 per cent. of the goods, their Lordships agree with the view of the Supreme Court that the provisions of the amending Act, 17 Geo. 5, c. 69, as to penalties applies, as after its coming into force on April 14, 1927, whether the default of payment of tax has arisen prior to that date, or only subsequently.

Parties were agreed that the correct basis for computation of the sales tax was the invoice price at London and not the advanced price at the riverside, which was the basis adopted in the judgment of the Exchequer Court and also by the Supreme Court in its formal judgment. After special leave to appeal to His Majesty in Council had been granted, an agreed application was made to the Supreme Court for alteration of their formal judgment, but such alteration was then beyond their control, and their Lordships were requested to give effect to this agreement of parties.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed as regards the 83 per cent. of the Crown's claim, which should to that extent be dismissed, and that, as regards the 17 per cent. of the Crown's claim, the judgment of the Supreme Court should be varied to the effect that the sales tax should be computed on the basis of the invoice prices at London. The appellant should have his costs of this appeal and one-half of those incurred in the Courts below.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*
1931
March 6.

SEDGWICK . . . . APPELLANT;

AND

WATNEY, COMBE, REID AND COMPANY, LIMITED, AND OTHERS . . RESPONDENTS.

GROVE . . . . APPELLANT;

AND

LLOYDS BRITISH TESTING COMPANY, LIMITED . . . . RESPONDENTS.

TURPIN . . . . APPELLANT;

AND

ASSESSMENT COMMITTEE FOR MIDDLESBROUGH ASSESSMENT AREA . . . . RESPONDENTS.

KAYE . . . . APPELLANT;

AND

EYRE BROTHERS, LIMITED . . . . RESPONDENTS.

KAYE . . . . APPELLANT;

AND

BURROWS AND OTHERS . . . . . . RESPONDENTS.

HINES . . . . APPELLANT;

AND

EASTERN COUNTIES FARMERS' CO-OPERATIVE ASSOCIATION, LIMITED . . . . RESPONDENTS.

FINN . . . . APPELLANT;

AND

KERSLAKE . . . . RESPONDENT.

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* *Present:* VISCOUNT DUNEDIN, LORD TOMLIN, LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

UNION COLD STORAGE COMPANY, LIMITED . . . . APPELLANTS;

AND

BANCROFT AND OTHERS . . . . . RESPONDENTS.

H. L. (E.)
1931
SEDGWICK
v.
WATNEY,
COMBE,
REID & CO.
(AND SEVERAL OTHER APPELLANTS AND RESPONDENTS).
THE INDUSTRIAL HEREDITAMENTS CASES.

Rating — Derating — Industrial Hereditament — Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-ss.* 1, 2, 4.

These appeals were, with the exception of *Turpin* v. *Middlesbrough Assessment Committee* and *Kaye* v. *Eyre Brothers, Ld.*, heard separately, but, upon consideration, were dealt with together by Viscount Dunedin in a composite opinion which was delivered as the opinion of the House.

SEDGWICK *v.* WATNEY, COMBE, REID AND COMPANY, AND OTHERS.

LTSHIRE COUNTY VALUA-
LONDON CO-OP. SOC.,
1 All E.R. 937.

Beer Bottling Stores.

Brewers occupied a bottling store in which beer brewed by them elsewhere was matured, carbonated, filtered and bottled, and from which, after the bottles had been corked and labelled, it was distributed to the trade. The beer when it entered the premises was unmarketable, and was converted by processes carried on therein into the commodity known as bottled beer. The hereditament was a factory within the Factory and Workshop Acts. The Revenue Officer objected to the inclusion of the hereditament in the special list as an industrial hereditament under s. 3 of The Rating and Valuation Apportionment Act, 1928, on the ground that it was primarily occupied and used for the purposes of distributive wholesale business within the exception (*c*) in s. 3, sub-s. 1, of the Act :—

Held, that the treatment to which the beer was subjected in the hereditament was not a mere prelude to distribution, but changed the liquid from an unfinished article to a finished one—namely, bottled beer—which was not ready for distribution until the bottles had been corked and labelled, and that the hereditament did not fall within the exception and was therefore an industrial hereditament.

Inland Revenue Officer v. *William Younger & Co.* 1930 S. C. 548 overruled.

Decision of the Court of Appeal [1931] 1 K. B. 396 affirmed.

APPEAL from an order of the Court of Appeal (Scrutton, Greer and Slesser L.JJ.), reversing an order of the Divisional Court (Lord Hewart C.J. and Branson J.; Avory J. dissenting) upon a case stated under s. 40 of the Valuation

(Metropolis) Act, 1869, whereby it was adjudged that judgment be entered for the appellant, the Revenue Officer, and that the Special List be corrected by deleting therefrom all reference to the respondents' hereditament.

The facts are fully stated in the report of the case before the Court of Appeal and in the opinion of Viscount Dunedin, and are summarized in the headnote.

1931. Feb. 3, 5. *Sir William Jowitt A.-G.* (with him *Wilfrid Lewis* and *Colin H. Pearson*) for the appellant. The question whether this hereditament is primarily occupied and used for the purposes of distributive wholesale business depends on the question whether the bottling is to be allocated to the manufacturing or the distributive side of the business. Admittedly there was carried on here a manufacturing process, but the manufacture of the article was complete after carbonation and filtration, and whatever was done thereafter must be attributed, not to a factory purpose, but to a distributive purpose. Otherwise it is difficult to see how any meaning can be given to exception (*c*) in the proviso to s. 3, sub-s. 1. The article, which is artificially carbonated beer, must be preserved and distributed. That means that it must be bottled and corked and for trade purposes must be labelled. Putting the article in a container is not adapting for sale at all: *Law* v. *Graham* (1), which was a decision under the Factory and Workshop Act, 1878. In *Hoare* v. *Truman, Hanbury, Buxton & Co.* (2)—a decision under the same Act—it was held that bottling stores used for aerating and bottling beer were a non-textile factory, and that is conceded. In *James Keith, Ld.* v. *Kirkwood* (3)—a decision under the Factory and Workshop Act 1901—it was held that the process of bottling beer was neither an adaptation of an article for sale nor a manufacturing process: see also *Kavanagh* v. *Caledonian Ry. Co.* (4) [He also referred to *Whitbread & Co.* v. *Assessor for Edinburgh* (5); *John Walker & Sons* v. *Assessor for*

(1) [1901] 2 K. B. 327, 330.
(2) (1902) 71 L. J. (K. B.) 380.
(3) 1914 S. C. (J. C.) 150, 155.
(4) (1903) 5 F. 1128.
(5) 1928 S. C. 425, 429.

Kilmarnock (1); and *Distillers Co.* v. *Assessor for Edinburgh* (2) —decisions under the Rating (Scotland) Act, 1926, which allowed certain deductions in the case of "mills, manufactories, works or premises of a similar character used wholly or mainly for industrial purposes."] The following decisions of the Scottish Valuation Court under the present Act support the appellant's contention that this hereditament is primarily occupied and used for the purposes of distributive wholesale business: *Inland Revenue* v. *John Walker & Sons* (3); *White Horse Distillers* v. *Inland Revenue* (4); *Inland Revenue* v. *Maclachlans* (5); *Inland Revenue and Assessor of Dundee* v. *Whitbread & Co.* (6); *Inland Revenue* v. *William Younger & Co.* (7); see also *Distillers Co.* v. *Inland Revenue* (8); *Inland Revenue* v. *Tranent Co-operative Society.* (9)

Wilfrid Greene K.C. (with him *Maurice Healy*) for the respondents. It is said that this hereditament is primarily used for the purposes of wholesale distributive business. Every manufacturing hereditament is necessarily conducting some distributive activity, and it may be conceded that the words of the exception will cover some part of a manufacturer's activity; but distributive wholesale business is something different from distribution. This hereditament is used for the manufacture of a mechantable commodity known as bottled beer, and that merchantable commodity is not produced until it is put into a bottle. The bottling is therefore part of the manufacturing process. This is not analogous to a case of putting biscuits into a tin, but is analogous to the case of a soda water manufacturer.

Wilfrid Lewis in reply. The question is whether the bottling of carbonated beer is the last stage of manufacture or the first stage of distribution. In the present state of the authorities bottling per se is not a manufacturing process.

The House took time for consideration.

(1) 1928 S. C. 430, 434.
(2) 1928 S. C. 435.
(3) 1930 S. C. 372.
(4) 1930 S. C. 426.
(5) 1930 S. C. 449.
(6) 1930 S. C. 516, 519.
(7) 1930 S. C. 548.
(8) 1930 S. C. 329.
(9) 1930 S. C. 503.

Distinguished. Acton Corpn. *v.* West Middx. Ass. Com. [1949] 1 All E.R. 409.

H. L. (E.)
1931

Sedgwick *v.* Watney, Combe, Reid & Co. (and several other appellants and respondents).

The Industrial Hereditaments Cases.

GROVE *v.* LLOYD'S BRITISH TESTING COMPANY, LIMITED.

Cable Testing Station.

The respondents occupied and used a testing establishment for the purpose of carrying on the business of testing and finishing cables and anchors under a licence from the Board of Trade, pursuant to the Anchors and Chain Cables Act, 1899, and they gave certificates in respect of the cables and anchors which had passed the tests. The Act of 1899 prohibited the sale in this country of anchors and cables which had not been proved according to its provisions. The hereditament was admitted to be a factory within the meaning of the Factory and Workshop Acts. The processes employed involved the manufacture and replacement of faulty links in cables or faulty parts in anchors, and the scaling, tarring and finishing of cables and anchors before delivery to the ultimate consignees. The Revenue Officer objected to the inclusion of the hereditament in the Special List as an industrial hereditament on the ground that it was primarily occupied and used for purposes which were not those of a factory or workshop within the exception (*f*) in s. 3, sub-s. 1, of the Act of 1928.

Held, that the hereditament was primarily occupied and used for the purpose of testing operations, which were not factory purposes, and fell within the exception.

Decision of the Court of Appeal [1931] 1 K. B. 404 reversed.

Appeal from an order of the Court of Appeal reversing by a majority (Greer and Slesser L.JJ.; Scrutton L.J. dissenting) an order of the Divisional Court, which affirmed by a majority (Lord Hewart C.J. and Branson J.; Avory J. dissenting) a decision of the Recorder of the County Borough of Dudley upon a Special Case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925.

The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the opinion of Viscount Dunedin, and they are summarized in the headnote.

1931. Feb. 5. *Sir William Jowitt A.-G.* (with him *Wilfrid Lewis* and *Colin H. Pearson*) for the appellant. This hereditament is primarily occupied and used for the purpose of testing anchors and cables, which is not a factory purpose. Testing is not adapting for sale. Adapting indicates some physical operation performed on the article itself with the object of bringing about some change in the article. Testing is to see whether the article is adapted for sale. The finishing in this case is merely incidental to testing.

Comyns Carr K.C. (with him *John Wylie*) for the respondents. Testing is in itself an adapting for sale. Adapting for sale in s. 149 of the Factory Act, 1901, must cover something not previously enumerated. If physical change is involved, that is covered by "altering" in the previous clause. Therefore it must include something not involving any physical change; selection is sufficient. But further, the testing in this case does involve a physical change. The testing mark put on the article makes it saleable. The authorities show that a very slight degree of sorting or arranging is an adapting for sale: *Henderson* v. *Glasgow Corporation* (1); *Fullers, Ld.* v. *Squire.* (2) Assuming that testing is not per se a factory purpose, when the testing can only be done in a factory, as defined in the Factory Acts, that is a factory purpose. This hereditament is admittedly a factory, and the sole purpose of the factory is testing. Testing therefore must be a factory purpose. "Primary" presupposes something which is to be contrasted with it. There must be two purposes. But here there is only one purpose; everything else is merely incidental. Therefore there can be no question of primary purpose.

[He also referred to *Owner* v. *Cottingham Sanitary Steam Laundry Co.* (3); *Johnston* v. *Lalonde Brothers & Parham.* (4)]

Sir William Jowitt A.-G. replied.

The House took time for consideration.

TURPIN *v.* MIDDLESBROUGH ASSESSMENT COMMITTEE.

KAYE *v.* EYRE BROTHERS, LIMITED.

Motor Repair Works.

In the first case a garage and motor repair depot was occupied and used for repairing motor cars, motor boats and agricultural tractors brought or sent to the premises by the owners, for garaging cars, and

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(1) (1900) 2 F. 1127, 1132.
(2) [1901] 2 K. B. 209.
(3) (1910) 74 J. P. 219.
(4) [1912] 3 K. B. 218.

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for the sale of petrol and small motor accessories, but the greater part of the business there carried on consisted in the repair of motor cars.

In the second case a hereditament was occupied and used for the repair of motor cars and the storage of motor cars undergoing repair, and for the storage of spare parts and accessories needed for repairs, and petrol was sold there as incidental to such repairs only. The occupiers owned other premises in the borough, where they sold cars and motor accessories:—

Held, in each case, that the hereditament was primarily occupied and used for the purpose of a retail shop, as defined by the Act of 1928, within the exception (*b*) in s. 3, sub-s. 1, and was not an industrial hereditament.

Decisions as to the premises of *William Barr* and *Ethel Smith* in *Inland Revenue* v. *Moffat* 1930 S. C. 412, and *Inland Revenue* v. *W. & T. Avery, Ld.* 1930 S. C. 490 approved.

St. Cuthbert's Co-operative Association Ld. v. *Assessor for Edinburgh* 1931, S. L. T. 144 distinguished.

Decision of the Court of Appeal [1931] 1 K. B. 441, 442 reversed in each case.

These two appeals were heard together.

TURPIN *v.* MIDDLESBROUGH ASSESSMENT COMMITTEE.

APPEAL from an order of the Court of Appeal (Scrutton, Greer and Slesser L.J.) affirming an order of the Divisional Court (Talbot and Finlay JJ.; Avory J. dissenting), which affirmed an order of the Court of Quarter Sessions, whereby it was held that a certain hereditament known as the White House Garage, Middlesbrough, had been rightly placed on the Special List as an industrial hereditament.

The facts are fully stated in the report of the case before the Court of Appeal and in the opinion of Viscount Dunedin.

KAYE *v.* EYRE BROTHERS, LIMITED.

APPEAL from an order of the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) affirming an order of the Divisional Court (Talbot and Finlay JJ.; Avory J. dissenting), which reversed an order of the Court of Quarter Sessions for the West Riding of Yorkshire in favour of the Revenue Officer.

The facts are fully stated in the report of the case before the Court of Appeal and in the opinion of Viscount Dunedin.

1931. Feb. 6, 9. *Sir William Jowitt A.-G.* (with him *Wilfrid Lewis* and *Colin H. Pearson*) for the appellant in each case. A shop is a hereditament at which things are sold by retail and to which the public resort for that purpose. But by s. 3, sub-s. 4, of the Act of 1928, this definition is enlarged and retail repairs are part of retail shop purposes, if carried on in a retail shop or premises of a similar character. The words "of a similar character" do not refer to the physical aspects of the hereditament, but to the nature of the work carried on there, and under this Act a retail shop includes any building to which the public come to have retail business conducted, whether sales or repairs: *Inland Revenue* v. *Assessor for Edinburgh* (*Hunter's* case) (1); *Inland Revenue* v. *Moffat* (2); *Inland Revenue* v. *Assessor for Edinburgh* (*Gibson's* and *Allan's* cases) (3); *Inland Revenue* v. *W. & T. Avery, Ld.* (4) *Inland Revenue* v. *Caplan* (5) is distinguishable, because there the business carried on was not repair but the reconstruction of broken down cars. *St. Cuthbert's Co-operative Association, Ld.* v. *Assessor for Edinburgh* (6) is also distinguishable, because that was a case, not of retail, but of wholesale repairs. That case may be usefully contrasted with *Ideal Cleaners and Dyers, Ld.* v. *West Middlesex Assessment Committee.* (7) *Wallace* v. *Dixon* (8), a decision under the Shops Act, 1912, shows that an office which has neither a shop window nor a counter may be a shop within the meaning of that Act.

Hedley K.C. and *Paley Scott* for the respondents in *Turpin's* case. The sole question for determination in this case is a question of fact for the Recorder, who has found as a fact that this hereditament was not primarily occupied and used for the purposes of a retail shop. Repairing is not included in retail trade, unless the premises in which the repairs are executed are similar in character to a retail shop. The word "similar" has reference to the physical characteristics of the hereditament itself, and not to the business which is

(1) 1930 S. C. 362.
(2) 1930 S. C. 412, 416, 418.
(3) 1930 S. C. 443.
(4) 1930 S. C. 490.
(5) 1930 S. C. 507.
(6) Since reported 1931, S. L. T. 144.
(7) (1930) 46 Times L. R. 371.
(8) [1917] 2 I. R. 236.

there carried on. A cobbler's shop would clearly be included, but a ship repairing yard would clearly not be. Finlay J. puts the respondents' point. In his opinion retail trade means, speaking generally, buying and selling in small quantities, and a retail shop is a shop where such trade is carried on; and among the characteristics of a retail shop are a window and counter. A place not possessing the distinguishing marks of a retail shop does not become a retail shop because repairs are carried on there.

Willoughby Jardine K.C. and *W. P. Donald* for the respondents in *Kaye's* case. This case is distinguishable from the foregoing in that the respondents' repairing activities are segregated from their selling and storage activities. The premises in question are the respondents' works and have nothing to do with their shop, and the particular activity there carried on is a purely industrial purpose: per Lord Sands in *Inland Revenue* v. *Caplan* (1); see also *Inland Revenue* v. *Clan Line Steamers, Ld.* (2) The Scottish authorities show that repair is work of an industrial character, unless done in premises similar to a retail shop.

Wilfrid Lewis replied.

The House took time for consideration.

KAYE *v.* BURROWS AND OTHERS.

Rag Sorting Warehouse.

A rag merchant's warehouse was occupied and used, as to one-third of its area, for the grading, blending and sorting of rags, and, as to two-thirds, for the storage of rags (*a*) awaiting these processes; (*b*) in the course of preparation; and (*c*) fully dealt with and ready for despatch to the rag merchant's customers. The rags, after being subjected to the above processes, were sold wholesale to heavy woollen cloth manufacturers for use in the heavy woollen cloth industry and until so treated were useless for that purpose. The Revenue Officer objected to the inclusion of these premises in the Special List as an industrial hereditament, on the ground that the premises were primarily occupied and used for the purposes of wholesale distributive business or for the purposes of storage:—

Held, (1.) that the hereditament was primarily occupied and used not for the purposes of wholesale distributive business, but for the conversion

(1) 1930 S. C. 507, 509. (2) 1930 S. C. 445.

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of the articles which entered the hereditaments into finished and saleable articles by means of the processes to which they were there subjected, and that this was an adaptation for sale; (2.) that the storage was merely incidental to those processes.

Held, therefore, that the hereditament was an industrial hereditament.

Paterson v. *Hunt* (1909) 101 L. T. 571 overruled unless distinguishable.

Lord Sands' dissentient judgment in *Inland Revenue* v. *Easson* 1930 S. C. 480 approved.

Decision of the Court of Appeal [1931] 1 K. B. 469 affirmed.

APPEAL from an order of the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) reversing an order of the Divisional Court (Avory, Talbot and Humphreys JJ.) affirming a decision of the Court of Quarter Sessions in favour of the Revenue Officer.

The facts are fully stated in the report of the case before the Court of Appeal and in the opinion of Viscount Dunedin.

1931. Feb. 9, 10. *Wilfrid Lewis* (*Sir William Jowitt A.-G.* and *Colin H. Pearson* with him) for the appellant. It is conceded that the work of sorting rags brings these premises within the definition of a factory or workshop, but it is submitted that the premises are primarily occupied and used either for the purposes of distributive wholesale business or for the purposes of storage. *Paterson* v. *Hunt* (1) shows that the sorting of rags in that case was neither a manufacturing process nor an adapting for sale.

[LORD THANKERTON referred to *Fullers, Ld.* v. *Squire.* (2)]

In *Inland Revenue* v. *Easson Brothers* (3) the Scottish Valuation Court decided by a majority (Lord Sands dissenting) that premises primarily used for the purposes of sorting rags were not an industrial hereditament. That decision covers this case. In *Inland Revenue* v. *Donaldson & Co.* (4) a seed merchant's premises, where seeds were cleaned, stored and sold to retail dealers, were held to be not an industrial hereditament, by Lord Hunter on the ground that the premises were primarily occupied and used for the purposes of wholesale distributive business, by Lord Sands on the ground that they were so occupied and used for the purposes of storage, and by

(1) 101 L. T. 571, 572.

(2) [1901] 2 K. B. 209.

(3) 1930 S. C. 480, 483.

(4) 1930 S. C. 348.

Lord Fleming on both grounds. So in *M'Leod & Sons* v. *Inland Revenue* (1) woolbrokers' premises where fleeces were graded and packed in bales were held to be primarily used for the purposes of wholesale distributive business. [He also referred to *Inland Revenue* v. *John Walker & Sons* (2) and *Pilkington Brothers, Ld.* v. *Inland Revenue.* (3)] As to storage, if area is the test the Crown succeeds; secus if the storage is simply ancillary to the processes carried on on the premises.

Comyns Carr K.C. (with him *W. Stewart*) for the respondents. There is one process only carried on on this hereditament, and that process makes it a workshop. Therefore it cannot be said that this is not a workshop purpose. This case is covered by *Weatherhead* v. *Bradford Assessment Committee and Laycock & Co.* (4), a decision of the Court of Appeal from which no appeal has been brought to this House.

[He was stopped.]

The House took time for consideration.

HINES *v.* EASTERN COUNTIES FARMERS' CO-OPERATIVE ASSOCIATION, LIMITED.

Seed Cleansing Premises.

A seed merchant's warehouse was used for the cleansing and preparation for sale of seeds by the use of machinery. The Revenue Officer objected to the inclusion of this hereditament in the Special List as an industrial hereditament on the ground that it was primarily occupied and used for the purposes of wholesale distributive business:—

Held, on the grounds stated in the previous case, that it was an industrial hereditament.

Decision of the Court of Appeal [1931] 1 K. B. 446 affirmed.

Appeal from an order of the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) reversing an order of the Divisional Court (Avory, Talbot and Finlay JJ.), whereby an appeal by the Revenue Officer upon a Special Case stated by order of the Court and by consent of the parties in pursuance of s. 11 of the Quarter Sessions Act, 1849, was allowed, and the decision of the Assessment Committee for the Ipswich County Borough Assessment Area was reversed.

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(1) 1930 S. C. 434.
(2) 1930 S. C. 372.
(3) 1930 S. C. 387.
(4) (1930) 46 Times L. R. 601, 611; since reported in [1931] 1 K. B. 465.

The facts are fully stated in the report before the Court of Appeal and in the opinion of Viscount Dunedin.

1931. Feb. 10. *Sir William Jowitt A.-G.* (with him *Wilfrid Lewis* and *Colin H. Pearson*) for the appellant. The rival contentions are set out in *Inland Revenue* v. *John Donaldson & Co.* (1), and the appellant is content to rely upon the decision of the Scottish Valuation Court in that case.

Singleton K.C. and *Charles L. Henderson* for the respondents were not called on.

The House took time for consideration.

FINN *v.* KERSLAKE.

Baker's Shop and Bakehouse.

The respondent carried on a retail business in bread and confectionery in a hereditament comprising a shop with living rooms over and a bakehouse in the rear:—

Held, that the bakehouse, which made goods for the business, although a factory, was an ordinary part of a baker's shop, and that the whole hereditament was primarily occupied and used for the purposes of a retail shop, and was therefore not an industrial hereditament.

Dissentient judgment of Lord Hunter in *Inland Revenue* v. *Gunn, Collie & Topping* 1930 S. C. 389, 401 approved.

Decision of the Court of Appeal [1931] 1 K. B. 421 reversed.

APPEAL from an order of the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) reversing an order of the Divisional Court (Avory, Talbot and Finlay JJ.), whereby an appeal by the Revenue Officer upon a Special Case stated by order of the Court and by consent of the parties under s. 11 of the Quarter Sessions Act, 1849, was allowed, and the decision of the Assessment Committee of the Surrey North-Eastern Assessment Area was reversed.

The facts are fully stated in the report before the Court of Appeal and sufficiently appear from the opinion of Viscount Dunedin.

(1) 1930 S. C. 348.

1930. Feb. 12. *Sir William Jowitt A.-G.* (with him *Wilfrid Lewis* and *Colin H. Pearson*) for the appellant. Looking at these premises as a whole they are primarily used for the purposes of a retail shop. "Shop" is defined in the Oxford Dictionary as "a house or building where goods are made or prepared for sale and sold," and by s. 3, sub-s. 4, of the Act of 1928, "'Retail shop' includes any premises of a similar character where retail trade or business (including repair work) is carried on." As to the meaning of "business" see per Jessel M.R. in *Smith* v. *Anderson*. (1) Where "nothing is manufactured or adapted for sale in any part of the premises, except for the purpose of satisfying the requirements of customers to whom goods have been sold retail, the primary purpose for which the building as a whole is used is the carrying on of a retail business": per Lord Hunter in *Inland Revenue* v. *Gunn, Collie & Topping* (2), a group of cases dealing with bespoke tailors' premises. Lord Hunter differed from Lord Sands and Lord Fleming in the first case of the group in holding that the premises ought to be treated as a retail shop, and it is submitted that his view ought to prevail. *Inland Revenue* v. *Gunn, Collie & Topping* (2) was followed in two further groups of cases —one dealing with boot and shoemakers' premises: *Inland Revenue* v. *Moffat* (3), and another dealing with bakers' shops and bakehouses: *Inland Revenue* v. *Malcolm* (4), but they carry the matter no further. Having regard to the definition of retail shop in the Act, what is here being carried on is entirely retail business—the baking just as much as the selling. If not, the baking of bread is ancillary to the main purpose—the sale.

[He also referred to *Inland Revenue* v. *Assessor for Wigtownshire*. (5)]

Konstam K.C. and *Michael Rowe* for the respondent Kerslake. The Attorney-General proceeded on the definition of retail shop as extended by the Act, but the main object of the extension was to include repair work; there is nothing in the definition to show that retail business includes manufacturing on a large scale. The primary purpose for which this hereditament is occupied and used is that of a bakehouse—namely, to manufacture bread and other articles for profit, and such manufacture is not merely ancillary to sale. The fact that goods manufactured in a hereditament which is occupied and used as a factory are sold by retail from the same hereditament does not prevent the hereditament from being an industrial hereditament within the meaning of the Act. So far as this is a question of fact the Assessment Committee have found in the respondent's favour.

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(1) (1880) 15 Ch. D. 247, 258.
(2) 1930 S. C. 389, 401.
(3) 1930 S. C. 412.
(4) 1930 S. C. 437.
(5) 1930 S. C. 543.

Sir William Jowitt A.-G. replied.

The House took time for consideration.

UNION COLD STORAGE COMPANY, LIMITED *v.* BANCROFT AND OTHERS.

Cold Storage.

A hereditament was occupied and used for the refrigeration and the refrigerated storage of food and other produce.

The hereditament was a factory, and the refrigeration was effected by means of an elaborate process involving the use of machinery. 75 per cent. of the produce received was already refrigerated and was kept by the occupiers in that state:—

Held, that the hereditament was primarily occupied for the purposes of storage within the exception (*d*) in s. 3, sub-s. 1.

Decision of the Court of Appeal [1931] 1 K. B. 410 affirmed.

APPEAL from an order of the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) affirming an order of the Divisional Court (Lord Hewart L.C.J., Avory and Branson JJ.) whereby an appeal by the Revenue Officer upon a Case stated by consent and by order of the Court under s. 11 of the Quarter Sessions Act, 1849, was allowed and the decision of the Manchester Assessment Committee was reversed.

The facts are fully stated in the report before the Court of Appeal and in the opinion of Viscount Dunedin.

1931. Feb. 12. *Wilfrid Greene K.C.* and *G. Granville Sharp* for the appellants. The things specifically excepted by

s. 3, sub-s. 1, are non-factory purposes. Those purposes are exclusive. A storage purpose does not include storage if the purpose is a factory purpose. Therefore the question is: Is refrigeration a factory purpose? This hereditament is a factory by reason of the machinery necessary for refrigeration and the hereditament is constructed with a view to the requirements of refrigeration. The appellants are adapting the article for sale by the process of refrigeration—a process which renders possible a trade which otherwise would not exist. Articles which have been refrigerated undergo physical changes. They assume a character of their own, and cannot be sold as fresh. In determining whether this hereditament is used for the purpose of storage within s. 3, sub-s. 1, the Court may look beyond the storage and see what is the nature of the storage. *Union Cold Storage* v. *Inland Revenue* (1), which is opposed to the appellants' contention, was based upon *Milne and Union Cold Storage* v. *Assessor for Glasgow* (2)—a decision upon the Rating (Scotland) Act, 1926, where the language was different.

Sir William Jowitt A.-G. (with him *Wilfrid Lewis* and *Colin H. Pearson*) for the respondent. This case is unique, in that all the Courts are agreed about it. It is found as a fact that the process of bringing down the food to a frozen temperature applies to 25 per cent. only of the produce received. As to 75 per cent. it is preserved in precisely the same condition. That is not an adapting for sale. All storage involves some kind of activity, e.g., heating and ventilation, but it is none the less storage. There is no ground for saying that the purposes cannot overlap.

Wilfrid Greene K.C. replied.

The House took time for consideration.

1931. March 6. VISCOUNT DUNEDIN. My Lords, we are now to dispose of a batch of cases depending on the construction of the various clauses of the Derating Act which have come up to your Lordships' House. It is unnecessary to repeat the observations made in the opinions pronounced

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(1) 1930 S. C. 337.

(2) 1929 S. C. 296.

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in the recent case of *Moon* v. *London County Council* (1), as to the general scheme of the Derating Act.

SEDGWICK *v.* WATNEY, COMBE, REID AND COMPANY.

The facts are these. The respondents are brewers. As brewers, they make what is commonly known as bottled beer, and the hereditament which is the subject of controversy in the present case is used in connection with the manufacture of bottled beer. Bottled beer is manufactured in the following way :—

The beer is first brewed. This is not done on these premises. It is brought to the premises in tank wagons and pumped into large tanks. This is necessary in order to effect carbonation, which is done by putting carbonic acid gas into it. This done, it is filtered, and then by means of a filling machine, put into bottles which are corked and labelled. The bottles are then packed and removed for delivery to the trade. The carbonation is necessary in order to get the sparkle, which is the marked attribute of bottled beer. The beer as it comes in the tank wagon is not in a drinkable condition. It could not be sold as draught beer, but it is beer which is destined to be bottled beer.

It may here be as well to set forth once for all the actual words of the section, for all the cases turn on the interpretation of various portions of it.

Sect. 3, sub-s. 1, of the Act is as follows :—

" In this Act the expression ' industrial hereditament ' means a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop : Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say—

(*a*) the purposes of a dwelling-house ;

(*b*) the purposes of a retail shop ;

(1) [1931] A. C. 151.

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(*c*) the purposes of distributive wholesale business;
(*d*) purposes of storage;
(*e*) the purposes of a public supply undertaking;
(*f*) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

By sub-s. 2 (*b*) of the same section it is provided that for the purposes of the Act the expressions "factory" and "workshop" have respectively (with certain immaterial exceptions) the same meanings as in the Factory and Workshop Acts, 1901 to 1920.

Now, the question in the case is, whether the hereditament on which all this is done is entitled to be put on the Special List as an industrial hereditament. It is admittedly a factory, as it falls within one of the definitions of a factory under s. 149 of the Factory and Workshop Act, 1901. But the question on which the case turns is whether, though a factory, it is not an industrial hereditament, because it is, in terms of s. 3, sub-s. 1 (*c*), of the Act, primarily occupied and used for the purposes of distributive wholesale business. The course of decision in the case has been that the rating authority put the premises on the Special List, and their decision was upheld by the Assessment Committee. Appeal being taken to Quarter Sessions a Special Case was, by agreement, stated in terms of s. 40 of the Valuation (Metropolis) Act, 1869. On the Special Case being heard by the King's Bench Division, the decision of the Court below was reversed. From that judgment appeal was taken to the Court of Appeal, who reversed the judgment of the King's Bench Division and restored the judgment of the Assessment Committee.

In earlier stages it was asserted that the premises were also disqualified under sub-ss. (*d*) and (*f*) for "purposes of storage" and "any purposes, whether or not similar to the foregoing, which were not those of a factory or workshop." But the Attorney-General did not advance any argument in support of these reasons and rested his objection solely on (*c*), "the purposes of distributive wholesale business."

Now the first remark, which is indeed obvious, is that the words point at some kind of special use of the premises. In one sense any wholesale business is distributive, because no goods remain for ever in a factory. They leave the factory in order to be distributed. But without attempting any definition, which would be useless, as one cannot have in one's mind all the instances which may arise, it is easy to conceive premises used primarily for arranging for the process of distribution. Nor do I doubt that, in the case of premises where nothing was done except the mere bottling of a liquid, such premises might be said to be of that character. An illustration of a case which looks like that may be found in the case of *Law* v. *Graham* (1), although the actual question for decision was whether the premises were a factory. But the point is whether the treatment that the beer undergoes in these premises is a mere prelude to distribution. I am clearly of opinion that it is not. The finished article that is being prepared for distribution is bottled beer. The beer does not enter the premises as bottled beer. It undergoes treatment, a treatment which changes its quality and makes it from an unpotable and unmarketable article into a potable and marketable one. It is true that the treatment requires the use of a bottle, and that, when the treatment is finished, the bottle and its contents are ready for distribution. But what is really done on the premises is the turning of what I may call an unfinished liquid into a finished one.

The view which prevailed in the Divisional Court was enunciated by the Lord Chief Justice when he said: "The manufacture and adaptation for sale of the beer is finished as soon as the beer has been carbonated. The process of carbonisation is but a very small element in the processes carried on upon the premises, and we think that the Assessment Committee could not have arrived at the conclusion to which they came unless they had misdirected themselves upon the point as to where distribution begins."

This view is, I think, unsound. The article, as already said, which the brewers set out to produce is bottled beer, a liquid which is of a character different from that of draught beer, and which must be placed in bottles if its distinctive character is to be retained. Distribution of the article can only begin when the article is ready for delivery, a point of time which arrives not when the carbonated beer is in the vat, but only when it is in a bottle corked and labelled, because it is only then that it is a finished article. It is only then that the article known as bottled beer, so to speak, springs into existence. The distribution which then follows is no more than the ordinary distribution which follows on any goods being delivered forth from a factory.

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(1) [1901] 2 K. B. 327.

This is the view which commended itself to the Court of Appeal, and, in my opinion, the judgment of that Court was right.

The making of bottled beer which has been described accounts for 75 per cent. of the material cases dealt with in the factory, and, if the conclusion come to as to that is right, it is enough for the decision of the case that the primary occupation and use of the premises is not for the purposes of wholesale distributive business. But lest it should be thought that something has been overlooked, it may be mentioned that there is other beer treated for bottling which is not carbonated. It is called self-matured beer, and in this case the finishing is effected by leaving in the beer certain matters which will induce a secondary fermentation. This takes place on the premises, and the beer has to be watched and the precise moment selected for its being put into bottles. Then, again, these bottles have to be watched before the beer is considered to be finally ready, when the bottle is corked and labelled.

The same considerations really apply to this as to the first case, but, as already said, the matter is determined by the premises being primarily used for the manufacture of bottled beer as described.

Several cases decided in the Scottish Valuation Court were cited to us. The case most actually in point is that of *Inland Revenue Officer* v. *Younger.* (1) In that case there was a finding of the Committee that "the Committee were of opinion that in these premises the beer was altered, finished or adapted for sale, evidence having been given that the beer in the state in which it came into the premises could not be sold as bottled beer without undergoing the processes referred to." They accordingly put the premises on the Special List. This decision was reversed by the Court, and it is evident that that decision was in the view expressed in this judgment erroneous. Lord Sands seems to have had difficulty, but in view of former cases thought that it was well to lay down a general rule applicable to each class of industry. This remark is a little dangerous. Certain decisions will, it is hoped, prove of very general application, and so be of service to the local rating authority. But, after all, the question is an individual one as to each particular hereditament. It is for this reason that I do not refer specially to the cases of *Walker* (1) and *White Horse.* (2) These were cases as to whisky, and without the full facts before us it would, I think, be quite inadvisable to decide whether what is done in the blending of whisky puts the case on the same lines as the present. Nor is it necessary to comment on the other cases where the treatment of beer was the subject of discussion—namely, *Maclachlans* (3) and *Whitbread* (4), because there were questions as to how great a part of the premises was occupied for other purposes.

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(1) 1930 S. C. 548.

The result of the view taken in this case is that the appeal will be dismissed with costs. (5)

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 6, 1931.

Solicitor for the appellant: *Treasury Solicitor.*
Solicitors for the respondents: *Godden, Holme & Ward.*

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(1) 1930 S. C. 372.
(2) 1930 S. C. 426.
(3) 1930 S. C. 449.
(4) 1930 S. C. 516.
(5) NOTE.—The minutes of judgment and the names of the solicitors engaged in each case are given at the end of that portion of the opinion of Viscount Dunedin which deals with the particular case, instead of at the end of the composite opinion.

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GROVE v. LLOYDS BRITISH TESTING COMPANY, LIMITED.

The question in this case is whether the premises in which is carried on the testing of cables and anchors by the respondent company are an industrial hereditament. The Divisional Court, by a majority, held that they were not. The Court of Appeal, by a majority, held that they were. There is therefore an equal balance of judicial opinion.

The respondents are not makers of cables or anchors, only testers. By the Anchors and Chain Cables Act, 1879, penalties are enacted against all who sell, buy, or use untested cables, and certain establishments, of which the respondents' is one, are authorized to give testing certificates. The conditions of test are set forth. According to these conditions, what is done with a cable which is received for testing is as follows :—

Three links are sawed out of the cable. These links are subjected to a specific breaking strain. If they come away, three more links are cut out from the same length of cable. If these also come away, the cable is rejected and no certificate granted. If either of the sets of three links resist, the cable is joined together again by means of a new link forged on the premises and subjected to a tensile strain. If the cable fails it is rejected, but if it passes the test a certificate is granted.

In the Courts below the whole controversy was whether these works were or were not a factory, because it was assumed that if they were a factory, that would be an industrial hereditament, as they would not fall within any classes of the exceptions set forth above.

Now, there are three ways in which premises may become a factory. First, they may so become because they are mentioned by specific description in Part I. of the Sixth Schedule to the Factory and Workshop Act. Secondly, they may so become by being a place mentioned in Part II. of the said Schedule and within which mechanical power is used in aid of the manufacturing process carried on there. Thirdly, they may so become because they are premises where manual labour is exercised for the purpose of :—

(i.) the making of any article or part of any article ; or (ii.) the altering, repairing, ornamenting, or finishing of any article; or

(iii.) the adapting for sale of any article. . . .

and wherein mechanical power is used in aid of the manufacturing process carried on there. It was as to the third method that the difference of judicial opinion manifested itself. The opposing views may be well expressed in a very few sentences used by the learned judges who held opposing opinions.

"The making of the goods fit to be legally sold," says Greer L.J., "is the primary purpose for which the hereditament is used."

"The testing of the cables," says Slesser L.J., "was a part of the process of making them fit for sale. I therefore conclude that the phrase 'adapting for sale' includes adaptation for selling."

On the other hand, the Lord Chief Justice says: "Their task (i.e., the testers' task) is not to adapt the cables for sale, but to see that they have been so adapted."

And Scrutton L.J. says: "The cables are not adapted for sale, but tested to see if they are fit for sale."

In such an evenly balanced expression of judicial opinion it would be indecent to say that the question was perfectly plain, but I should not be dealing frankly with your Lordships if I allowed you to suppose that, so far as my personal opinion is concerned, I have been harassed by any doubt. Personally, I have no hesitation whatever in preferring the opinions of the Lord Chief Justice and Scrutton L.J. I think "adapting for sale" points clearly to something being done to the article in question which, in some way, makes it in itself a little different from what it was before. Now, testing does not in any way make the article different as an article from what it was before. It only proclaims its character. The insertion of the one link which is necessary to rejoin the cable after the links have been cut out is, as the Lord Chief Justice puts it, obviously only incidental to the operation of testing. The same must be said as to the removing of scale. And this view will be reinforced by contrast when the cases as to seeds and rags are discussed. No doubt the giving of the certificate makes the article, in a sense, more saleable than before. Without a certificate it would only be saleable in a foreign market, and even that sale would bring with it a penalty on the seller, but I cannot look on the granting of the certificate as an adaptation. If a horse is passed sound by a veterinary surgeon it becomes saleable in a way it was not before he was so passed, but no one would dream of saying that the veterinary surgeon by his certificate adapted the horse for sale.

All this may be no more than matter of impression. All I can say is that, so far as I am concerned, my impression is clear, and I have the satisfaction of knowing that all your Lordships agree with me.

But while this would settle the case as it left the Courts below, because the judgment held that the hereditament was not a factory, before the case arrived at your Lordships' House the parties became agreed that the premises were a factory, if not under the third method, at least under the first. For s. 13 of Part I. of the Sixth Schedule is as follows: "Metal and india-rubber works," that is to say, any premises in which steam, water or other mechanical power is used for moving machinery employed in the manufacture of machinery, or in the manufacture of any article of metal not being machinery, or in the manufacture of india-rubber or gutta-percha or of articles made wholly or partially of india-rubber or gutta-percha.

Undoubtedly, there is in the works the forging of links to join up the chains which have been severed, and that forging gives to the premises the character of a factory. The Attorney-General admits this in his case, but then he says: "True, it becomes a factory, but it is not an industrial hereditament because it is struck at by clause (*f*) of section 3 (1.), namely, being primarily occupied and used for other purposes which are not those of a factory or workshop."

Now, the question, put in this way, was, as I have said, not dealt with in the Courts below. In answer to the argument of the Attorney-General, Mr. Comyns Carr presented an argument to this effect: "This is," said he, "admittedly a factory, but this factory has only one purpose, to wit, testing. Therefore, it cannot be said that it is mainly used for a purpose which is not a factory purpose."

This argument is very ingenious, and seems, at first sight, difficult to answer, but, on consideration, I am satisfied that it is unsound. One must begin by remembering that, in considering this argument, testing alone is, ex hypothesi, not a factory purpose. The purpose of a particular factory must be gathered from that which makes it a factory. If it was made a factory because it fell within an actual description in Part I. of the Schedule, you must gather the purpose from that description. Here the hereditament is made a factory because of the manufacture of articles of metal. Therefore, so far as this hereditament is a factory, its purpose is the manufacture of metal. But the hereditament is, without doubt, primarily occupied and used for the purposes of testing operations, and such operations are, ex hypothesi, not factory purposes, consequently the case falls within the words of the exception, and the hereditament, although a factory, is not an industrial hereditament.

The appeal will therefore be allowed and the judgment of the Divisional Court restored. The appellants must have their costs in the Court of Appeal and in this House.

Order of the Court of Appeal reversed and judgment of the King's Bench Division restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, March 6, 1931.

Solicitor for the appellant: *Treasury Solicitor.*

Solicitors for the respondents: *Field, Roscoe & Co., for Jobson & Marshall, Dudley.*

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v.
WATNEY,
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(AND
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TURPIN *v.* ASSESSMENT COMMITTEE FOR MIDDLESBROUGH ASSESSMENT AREA.

My Lords, the question which arises on this appeal is whether or not a hereditament in Middlesbrough, consisting of a garage and motor repair depot, is an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act of 1928.

The Assessment Committee thought that it was, and included the hereditament in the Special List. An appeal to the Court of Quarter Sessions was dismissed. A Divisional Court (Avory J. dissenting) affirmed the decision of the Court of Quarter Sessions. The Court of Appeal unanimously affirmed the order of the Divisional Court.

The case which now comes for consideration before your Lordships' House is one the decision on which must necessarily affect the position under the Act of 1928 of those establishments which are common objects of the roadside, and in which repairs to cars can be effected and petrol obtained.

The building in question is built of brick and has a concrete floor. The floor space is (with a negligible exception) occupied by (*a*) an office and place for washing cars; (*b*) a workshop with plant machinery and power suitable for repair work; (*c*) two inspection pits; (*d*) space for cars while standing for repairs; and (*e*) space for garaging cars. No cars are stocked for sale, though occasionally the occupier sells a car, obtaining it from another dealer, and sharing with him the commission. He may sometimes have a second-hand car there for sale, either on commission or on his own behalf. He garages the cars of private owners; these cars average five at a time. He has also on the premises a motor cab for hire. At the front of the premises are windows exposing small accessories for sale, and outside the premises are three pumps for the supply of petrol to the public. Sales of accessories and petrol take place daily. Much the larger part of the premises and practically the whole of the working time of the occupier and of his employees are devoted to repair work. The repair work, which is principally concerned with motor cars, but extends to some extent to other matters, yields the larger part of the income of the business carried on. No one is employed on the premises specifically for selling purposes.

The hereditament is registered as and is clearly a factory within the Factory and Workshop Acts, 1901 to 1920. It is accordingly an "industrial hereditament" within s. 3, sub-s. 1, of the Act of 1928, unless it is primarily occupied and used for any of the purposes enumerated in the proviso or for any combination of such purposes.

The appellant contends that it is not an industrial hereditament within the section, because it is primarily occupied and used for the purposes of a retail shop. Whether a hereditament which (as here) is primarily occupied and used for the purpose of effecting repairs to cars and other objects to the direct orders of their owners is a retail shop within the meaning of the Act of 1928 is the sole question to be decided: and the decision will depend upon the view adopted as to the meaning and effect of the language used in sub-s. 4 of s. 3, relating to the words "Retail shop."

Sub-s. 4, so far as relevant, runs thus: "In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say :—

. . . .

"'Retail shop' includes any premises of a similar character where retail trade or business (including repair work) is carried on."

So far as appears from the Special Case, there is no indication that the learned Recorder took into consideration the words of sub-s. 4, and the specific allusion to repair work which it contains. He would seem to have contrasted the occupation and user of the hereditament for the purposes of buying and selling articles, storage of goods and garaging of cars on the one hand, with its user and occupation for the purpose of executing repairs on the other hand; and to have held that the hereditament was not primarily occupied and used for any of the purposes enumerated in the proviso or for any combination of such purposes, because the primary

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occupation and user of the hereditament taken as a whole was for the purpose of repairing.

In the Divisional Court the definition of "retail shop" was carefully considered.

Finlay J. thought that retail trade meant, speaking generally, buying and selling in small quantities; that a retail shop was a shop where such trade was carried on; and that a shop had certain physical characteristics of which such matters as the window and the counter were examples. He thought that the words "premises of a similar character" meant premises resembling a shop in physical attributes, and that the words "including repair work" only referred to such repairs "as reasonably fall to be included in retail trade and as are likely to be performed in a retail shop."

Talbot J. contrasted the definition of retail shop contained in the Act of 1928 with the definition of shop contained in the Shops Act, 1912. He thought that the words "of a similar character" should be construed liberally and in a popular and reasonable way. They included, in his opinion, the physical aspect and arrangement of the place, and he agreed with the judgment of Finlay J.

Avory J., on the other hand, was of opinion that in order to satisfy the words of the definition, it was not essential that the premises should resemble a shop in physical characteristics or that ordinary retail buying and selling should take place there. He thought that there was a retail business of repair work carried on upon the premises; and the Recorder having found that the hereditament was primarily occupied and used for the purposes of repairing, could not hold in law that the hereditament was an industrial hereditament within the meaning of the Act of 1928.

The Court of Appeal agreed with the view that since the primary occupation and use of the hereditament had been found to be for the purpose of repairing, the hereditament could not be said to be primarily occupied and used for the purpose of a retail shop. It is not easy to see the exact basis of the decision in the Court of Appeal. It is stated that they agree with the view of the majority of the Divisional Court as to "retail shop," but in addition there is a suggestion that something may turn upon the largeness or smallness of the value of the objects which are repaired, and of the cost of the repairs which are executed. This suggestion I confess does not recommend itself to me.

My Lords, the matter seems to me simply a question of attributing an every day meaning to the words used in the definition.

Upon the facts found this hereditament is primarily occupied and used for the purposes of repair work, done to cars and other objects brought or sent there by the owners, without the intervention of any middleman.

I do not pause to inquire whether a person who does such repair work could not properly be said to be carrying on a retail trade or business. It may be that in strictness the words "retail trade or business" are only applied with complete accuracy to cases of selling goods; or it may be that they may properly be applied to all trades and business which deal directly with the "consuming" customer.

In the present case all doubt is removed by the express inclusion of repair work in the term "retail trade or business."

I am unable to accept the view which was urged before your Lordships and which found favour in the Courts below, that the only repair work which is covered by the definition is repair work incidental to retail selling. I can see no justification for thus limiting the language of the definition.

Nor do I agree with the view that has prevailed as to the effect of the words "of a similar character." For myself I am unable to state what are the physical features the existence of which is essential to or distinctive of a retail shop. I am familiar with many physical features which are frequently and even commonly found in retail shops, such as counters and shop windows; but I am equally familiar with retail shops where no such features exist. In my opinion it is not possible to say that the words "of a similar character," even if they include, are limited to physical features of the premises. They must, as I read them, include also similarity of character in other respects. The character of the premises must be similar to the character of a retail shop. Now if we compare the hereditament here in question with a retail shop, do we find any common characteristics? My Lords, I think we do; for they are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein. Moreover, once you include repair work in the words "retail trade or business," it can be truthfully said that there is a similarity between the type of business carried on in this building and the type of business carried on in a retail shop. These common characteristics are, in my opinion, sufficient to satisfy the requirement that the premises should be of a character similar to the character of a retail shop.

It was said that this view would deprive the words of all effect. I think not. They would operate to exclude from the definition the extreme case put in argument and referred to in the judgments of the shipbuilding yard, which no one would dream of calling a retail shop.

It remains for me to say a few words about the relevant authorities which were cited in argument. The opinion which I have formed in the present case appears to me to accord with the decisions in regard to the premises of William Barr and Ethel Smith in *Inland Revenue* v. *Moffat* (1), and with the decision of the majority in *Inland Revenue* v. *Avery* (2), although I cannot assent to the view of Lord Sands in the last mentioned case, that works for the repair of lorries or reaping machines could not fall within the description of premises similar to a retail shop.

The present case is very different from the recent decision in the Valuation Appeal Court pronounced on January 14, 1931, on the appeal of St. Cuthbert's Co-operative Association, Ld. The case is not yet reported, but we were furnished with a transcript of a shorthand note of the judgments. (3) The hereditament there in question was used for the purpose of repairing boots and shoes. The public did not resort to the hereditament, but the articles repaired were collected at

(1) 1930 S. C. 412.

(2) 1930 S. C. 490.

(3) Since reported 1931, S. L. T. 144.

the appellant's branch shops throughout Edinburgh (to which the public resorted) and brought to the hereditament in question. It was held that the hereditament was neither a retail shop nor premises of a similar character. The essential fact in that case which prevented the hereditament from being "of a similar character" was that the public did not resort thereto.

For the reasons which I have indicated I am of opinion that the hereditament here in question is primarily occupied and used for the purposes of a retail shop, and that therefore it is not an industrial hereditament within the meaning of the Act of 1928.

This appeal accordingly succeeds, and the hereditament should be removed from the Special List.

The appellant must have his costs in this appeal and in the Courts below.

Order of the Court of Appeal reversed, and cause remitted back to the General Court of Quarter Sessions for the County Borough of Middlesbrough with a direction that the hereditament should be removed from the Special List. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, March 6, 1931.

Solicitor for the appellant: *Treasury Solicitor.*

Solicitors for the respondents: *Cunliffes, Blake & Mossman, for Meek, Stubbs & Barnley, Middlesbrough.*

KAYE *v.* EYRE BROTHERS, LIMITED.

My Lords, this appeal, which relates to a hereditament at Market Hill, Barnsley, raises for decision the same point as the appeal in the case of the Middlesbrough Garage, but the facts in the two cases are somewhat different.

In this case the Assessment Committee included the hereditament in the Special List as an industrial hereditament.

On appeal to the Court of Quarter Sessions it was excluded from the Special List. The Divisional Court (Avory J. dissenting) restored it to the Special List, a decision which the Court of Appeal affirmed.

The relevant facts are as follows :—

The respondents occupy various motor premises in Barnsley. They sell new cars, larger motor accessories and petrol to the public in Peel Street. They have a garage for private cars and their own hire vehicles in Western Street. They store and sell second-hand cars in Regent Street South. They have a shop and a showroom and their registered offices in Eldon Street. In addition they occupy the hereditament in Market Hill.

These last mentioned premises have a floor space of 590 square yards, of which about 520 square yards are used for repairing cars and storing cars which are there for the purpose of repairs. The rest of the space is utilized for storage of accessories and other articles needed for the repairs, for a mess-room for workmen, and for the accommodation of two motor spirit pumps. Six men and two boys are continuously employed there in motor repair work. The repair work is done to privately owned motor vehicles, and varies in character from simple to important jobs.

It is stated in the case that orders for a small proportion of the repair jobs done on the Market Hill premises were given at the Eldon Street premises. I think that inferentially this means that the other orders are given at Market Hill.

Any sales of accessories or petrol which take place at Market Hill are made only to the owners whose cars are being repaired there.

Finally, it is to be observed that the Market Hill premises (which are only separated from the Eldon Street premises by a narrow way) do not open directly on to a public thoroughfare. In order to reach them, an owner would have to drive his car along a roadway which leads out of Market Hill and is some 80 feet in length. The hereditament is registered as a workshop under the Factory and Workshop Acts, 1901 to 1920.

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These, my Lords, are the relevant facts. They establish beyond doubt that the hereditament is primarily occupied and used for the purposes of what may be conveniently termed retail repair work—i.e., repair work done to the order of the owner of the object which is repaired and without the intervention of any middleman.

I think it is plain that unless there is some difference between the facts of this case and the facts of the Middlesbrough case, sufficient to warrant you in saying that the Market Hill premises are not premises of a character similar to the character of a retail shop, this case falls to be decided in the same way as the last mentioned case.

For myself I can detect no sufficient difference, and I am accordingly of opinion that this appeal succeeds with costs here and below.

Order of the Court of Appeal reversed, and cause remitted back to the General Court of Quarter Sessions for the County Borough of Barnsley, with a direction that the hereditament should be removed from the Special List. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, March 6, 1931.

Solicitor for the appellant: *Treasury Solicitor.*

Solicitors for the respondents: *Corbin, Greener & Cook, for Smith & Ibberson, Barnsley.*

KAYE v. BURROWS AND OTHERS.

HINES v. EASTERN COUNTIES FARMERS' CO-OPERATIVE ASSOCIATION, LIMITED.

It will be convenient to discuss these two cases together, because the learned judges in the Courts below so constantly refer from one to the other.

First, to set out the facts in *Burrows'* case :—

The Special Case sets forth :—

" The total floor area of the hereditament is 5774 square yards, of which 1991 square yards are used for the preparation, ripping, clipping, grading, classification, blending and sorting of rags, which consist of old garments on the one hand, and tailors' new clippings on the other ; and of which 3753 square yards are used.

(*a*) For the storage of rags awaiting such processes.

(*b*) For the storage of rags partially prepared, graded, blended, and/or sorted ; and

(*c*) For the storage of such rags after they have been so dealt with and before despatch to the respondent's customers.

The said hereditament contains three electric cranes, one electric rag press for the purpose of packing and baling, and one hand rag press and numerous riddles upon which the rags are prepared, ripped, clipped, graded and sorted.

The said hereditament is registered as a workshop under the Factory and Workshop Acts, 1901 to 1920.

The said rags, after being ripped, clipped, graded, classified, blended and sorted, are sold wholesale to heavy woollen cloth manufacturers for use in the heavy woollen cloth industry.

The business of the respondent carried on in the said hereditament is the first process in the production of heavy woollen cloth, and is a branch of the heavy woollen cloth manufacturing industry centred in Dewsbury and other neighbouring towns.

The further processes in the production of heavy woollen cloth which are carried on elsewhere consist of pulling and spinning into yarn, and such yarn is used either alone or in conjunction with yarn spun from new wool in the manufacture of woven cloths.

In the heavy woollen manufacturing trade large quantities of woven patterned and coloured cloths are made from 'pulled' rags without the addition of any new wool and without re-dyeing.

The rag trade is an integral and necessary section of the heavy woollen trade.

The respondent purchases bales of miscellaneous rags, mixed and unsorted, from various parts of the world and also in the British Isles, and the rags so bought consist, as to part, of old garments, and as to part of tailors' new clippings.

The respondent sells assortments of rags adapted to particular trade descriptions or to the special needs of particular customers.

The rags so bought include in the way of fibrous materials, wool, cotton, silk, artificial silk, jute, hemp, imitation silk, and imitation wool, and individual rags contain combinations of the above materials.

The rags so bought are of no use for the purposes of the woollen cloth manufacturers until they have been ripped, clipped, sorted, graded or blended and/or prepared as above described.

The respondent produced to the Court a collection of 296 different sorts of fibrous materials as showing the effect upon the rags bought by him of the ripping, clipping, sorting, grading, blending and preparation above described carried out on the said hereditament, such materials being commercially known and recognized commodities in the rag trade and to shoddy and cloth manufacturers.

The following processes are carried on by the respondent in the said premises in order to produce the said 296 sorts :—

(*a*) The sorting, ripping, clipping, grading and classification of all kinds of rags into their respective fibrous groups.

(*b*) The removal of dirt and foreign matter from the said rags.

(*c*) The division or separation of rags into their component parts of different fibrous origin by clipping, ripping, or otherwise dividing or disintegrating old garments, by removing cotton stripes and/or selvedges from woollen tailors' clippings and unwanted colour stripes and/or selvedges whether of wool or cotton from such clippings, and by cutting out darns, clocks, seams and unwanted coloured parts from knitted garments.

The respondent deals with 95 per cent. of the total quantity of rags received by him according to the processes detailed in Clause 17 of this case.

The respondent blends from 25 per cent. to 50 per cent. of the rags dealt with by him.

By reason of the processes carried on by the respondent rags purchased as mixed rags in bulk as aforesaid are separated into sorts also in bulk of widely different values, quality, shade and character."

The Assessment Committee put the hereditament on the Special List. Quarter Sessions held by a majority that the business carried on in the hereditament was primarily distributive wholesale business, and removed it from the Special List. The Divisional Court affirmed this judgment. The Court of Appeal reversed and restored the judgment of the Assessment Committee.

Co-operative Association Case.

The Special Case sets forth :—

"The respondents carry on the business of seed merchants at the said premises comprising the aforesaid hereditament, and the said premises are a factory and workshop within the meaning of the provisions of the Factory and Workshop Acts, 1901 to 1920. The rateable value is 788*l.*

The hereditament is used and occupied by the respondents for the purposes of their trade in seeds. The seed warehouse is a six-floor building specially constructed for seed cleaning and is of large dimensions. Save as to a very small office, it is used exclusively for the purposes of treating and preparing seeds for sale.

Approximately 2000 tons of seeds are dealt with in the course of a year at the Hadleigh Road hereditament. With the exception of a very few tons the seed is as it comes from the threshing machine and in a rough, unclean and impure state. It undergoes upon the said premises treatment and preparation for sale. The methods of treatment and preparation vary according to the nature of the seed. No seed is

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warehoused as an end in itself upon the said premises. About 95 per cent. of the seed that comes to the premises is within the provisions of the Seeds Act, 1920 (10 & 11 Geo. 5, c. 54), and the Statutory Rules and Orders made thereunder."

Then follows a detailed account of the way in which various seeds are treated. The treatment is done entirely by machinery, and has for its object the separation of weed seeds and dirt of various sorts from the good seeds. In many cases the seed being treated is decorticated. In many cases, to obtain purity, the seeds have to be put through special machines in succession. There is no chemical change effected in the seed itself.

In this case the Assessment Committee put the hereditament on the Special List. The Divisional Court reversed that judgment and took it off the List. The Court of Appeal reversed the judgment of the Divisional Court and restored that of the Assessment Committee.

Before the Divisional Court pronounced their judgment there had been decided in the Scottish Courts several cases under the present Act, which were cited. The first to be mentioned is *Eassom.* (1) That was a case where rags were dealt with for paper manufacturing purposes. Besides rags proper, there were waste paper, rope, canvas, twine, and all kinds of cotton, linen, and silk cuttings. This mass of material was cleaned, sorted out, and classified into more than 80 different categories, packed into bales by hydraulic presses, and the bales then sold to paper makers.

The Valuation Committee put the hereditament on the Special List. The Valuation Court, by a majority, reversed that decision, and founded their judgment mainly on the case of *Paterson* v. *Hunt* (2), but Lord Sands dissented and, as his judgment was specially approved by the Court of Appeal, it will be convenient to quote the passage quoted by Greer L.J. in *Burrows'* case: "On the counter emptied out of collecting carts there is a huge amorphous mass of waste paper, rags, etc., mixed with dirt and rubbish, which no paper manufacturer would look at. The workers produce a number of orderly bales in eighty different classes which the papermakers readily buy for substantial sums. Can it reasonably be said that there has been no adaptation for sale of the mass of material which was emptied out of the carts, and which, so far as not discarded as dirt or rubbish, is now arranged in orderly merchantable bales? I understand the argument to be that, if you look at one particular rag or one particular scrap of paper, that rag or that scrap of paper has not been subjected to any treatment which alters it or adapts it for sale. As it appears to me, this is an altogether artificial and superficial argument. The papermaker is not buying one rag or one piece of waste paper; he is buying a bale. If what had happened was that the papermaker had come into the premises saying 'I want a blue cotton rag' or 'a piece of brown paper' I could understand the argument that there had been no adaptation of the particular article for sale. All that had been done was to arrange the articles so as to avoid the trouble of having to rummage through the heap whenever a papermaker comes in and asks for something. But that is not the condition of the problem. If one regards the whole mixed mass that comes into the works, that mass has been adapted for sale, or made saleable, by laborious assortment."

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(1) 1930 S. C. 480, 485.

(2) 101 L. T. 571.

There was also the case of *Donaldson* (1), which was a case of seed-cleaning on all fours with the present. The case was decided on two grounds, distributive business and storage. The majority, the same who decided *Easson's* case (2), decided on both grounds, Lord Sands only on the ground of storage.

Whether the hereditament is primarily used for purposes of storage is obviously a question depending on the facts of the particular case.

Coming now to the present cases, in the seed case before the Divisional Court the learned judges say that, so far as the premises are used for the sorting and cleaning of seeds, the case is governed by the decision in *Paterson* v. *Hunt*. (3) They also approve of the Scottish decision in the case of *Donaldson*. (1) They point out that there is no change effected in the seed itself, and so they came to the conclusion that the primary purpose for which the hereditament was used was a distributive wholesale business. They, curiously enough, overlooked the fact that over 85 per cent. of the output of the factory was sold retail to farmers, but that may, for the moment, be put aside, because the crucial question, treating this as a leading case, is whether there is here primarily a distributive business or an adapting for sale.

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(1) 1930 S. C. 348.
(2) 1930 S. C. 480.
(3) 101 L. T. 571.

In the rag case they felt more difficulty, and Talbot J., in particular, would, if he thought he was free to judge on the facts, have come to a different conclusion. But, on the whole, looking at what they had done in the seed case, at *Paterson* v. *Hunt* (1), and at the Scottish case of *M'Leod & Sons* v. *Inland Revenue* (2), a wool sorting case, they thought they ought not to interfere with the judgment at Quarter Sessions.

In the Court of Appeal in the seed case Scrutton L.J. said this (3): "In my view, there was both alteration of substance and adapting for sale in sorting, making a substantially different article in bulk from that which existed before the processes were applied. In my opinion, you cannot deal with the case by saying there was a seed before the process and the same seed after the process. The process has altered the bulk and made it legally and commercially saleable. The process being therefore a factory process, for the reasons already given I do not think its purpose can be displaced by saying the process is carried out for the ultimate or ulterior purpose of wholesale distribution. This, as already said, would destroy all derating."

Greer L.J. quotes and approves of Lord Sands' dissenting judgment in *Easson's* case (4), which has been quoted above, and says that the same considerations are conclusive in the decisions in the seed cases, the wool sorting cases and scrap iron cases.

In the rag case Scrutton L.J. says that it follows the seed case and describes the result of the processes carried out by saying: "The sorted results are sold when the original bulk could not be sold." He again expresses his agreement with Lord Sands in *Easson's* case. (1) Greer L.J. had already expressed his opinion as above.

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(1) 101 L. T. 571.

(2) 1930 S. C. 434.

(3) [1931] 1 K. B. 504.

(4) 1930 S. C. 480, 485.

In both of these cases I agree with the Court of Appeal and approve the view of Lord Sands in the passage quoted. The test is just as it was in the bottled beer case. You must look at what is the finished article to be turned out. If that finished article is only put into the condition of a finished article by the processes to which it has been subjected in the hereditament, then the processes will fall within the expression "altering or adaptation for sale."

There is an older Scotch case which does not appear to have been cited in the Courts below: *Henderson* v. *Glasgow Corporation*. (2) In that case the Glasgow Corporation accumulated the street sweepings and, mixing them with ashes by a mechanical process, produced out of the mass a produce saleable as manure. It was held that this was an adaptation for sale and made the premises a factory.

In both the cases of the rags and the seeds the finished article is different from the article in bulk which enters the hereditament, and that is, in my opinion, an adaptation for sale.

It is here that one gets the contrast with the cable testing case, for there is no difference, in that case, between the article, as an article, which enters and that which leaves the hereditament.

A word must now be said as to the case of *Paterson* v. *Hunt* (3), which really formed the foundation of the majority judgment in the Scottish Court in *Easson's* case (1) and in the first case in the English Court. In that case it was held by Lord Alverstone and Lord Darling that sorting rags was not an adaptation for sale, and that consequently premises where rag-sorting was carried on were not a factory. It is left doubtful by the report whether what was done there was at all the same complicated process as was done in the rag case

(1) 1930 S. C. 480, 485.

(2) 2 F. 1127.

(3) 101 L. T. 571.

here. If the operation was not the same then the case does not apply. If it was practically the same, then it is not binding on your Lordships, and I may say that it was wrongly decided.

As regards storage I am of opinion that storage in s. 3, sub-s. 1 (*d*), means storage as a purpose and end in itself, and that such storage as is merely a necessary and transitory incident of the manufacturing process which is being carried on does not fall within the definition. Accordingly in *Burrows*' case I think the premises are not "primarily occupied and used for purposes of storage."

The result is that, in both cases, the judgment of the Court of Appeal is affirmed and the appeals are dismissed with costs.

KAYE *v.* BURROWS AND OTHERS.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 6, 1931.

Solicitor for the appellant: *Treasury Solicitor.*

Solicitors for the respondent Burrows: *Torr & Co., for Clough, Crabtree & Ineson, Cleckheaton.*

HINES *v.* EASTERN COUNTIES FARMERS' CO-OPERATIVE ASSOCIATION, LIMITED.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 6, 1931.

Solicitor for the appellant: *Treasury Solicitor.*

Solicitor for the respondents: *Herbert Smith, for Westhorp, Cobbold & Ward, Ipswich.*

FINN *v.* KERSLAKE.

The hereditament here in question comprises a baker's shop with living rooms over and a bakehouse in the rear, and the respondent is occupier of the whole. The bakehouse

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is a factory under head 23 of Part II. of the Sixth Schedule of the Factory and Workshop Act, 1901, and therefore the whole hereditament is an "Industrial hereditament" under s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, unless it is excluded therefrom by reason of the proviso in that sub-section.

The Assessment Committee entered the hereditament on the Special List, and, on appeal by Special Case under the Quarter Sessions Act, 1849, a Divisional Court of the King's Bench reversed that decision, and on appeal from the latter decision the Court of Appeal restored the decision of the Assessment Committee.

In this appeal the Crown challenges the judgment of the Court of Appeal and maintains that the hereditament is excluded by the proviso on the ground that it is primarily occupied and used either (*a*) for the purposes of a retail shop, or (*b*) for purposes which are not those of a factory or workshop, its use for the purposes of a dwelling-house falling to be taken in combination with either (*a*) or (*b*). Under sub-s. 4 of s. 3: "Retail shop includes any premises of a similar character where retail trade or business (including repair work) is carried on."

It may be noted that, in order to qualify the whole hereditament—always subject to exclusion by reason of the proviso—as an industrial hereditament under s. 3, sub-s. 1, it is not necessary that the area affected by the Factory and Workshop Acts should be co-extensive with the hereditament, and this is illustrated by the present case. For the purpose of this first stage under the section the other uses of the hereditament are ignored. But when the proviso falls to be considered the occupation and use of the hereditament as a whole must be looked at; it may then be found that the occupation and use is only for one primary purpose, possibly with minor uses which are merely ancillary to the primary purpose and serving its end alone, or it may be found that there are really two distinct purposes of the occupation and use, in which case it will be necessary to decide, on a comparison of them, which is the primary use.

Further, the particular use of the hereditament which brings the hereditament or part of it within the Factory and Workshop Acts may be merely a minor and ancillary use which is an integral part of the primary use and is not to be separately regarded in considering the application of the proviso to the hereditament in question. The definition of retail shop, which includes a repair business carried on in premises similar to a retail shop, and the public supply undertakings excluded under head (*e*) of the proviso show that, with the exception of head (*f*), the purposes excluded are not confined to purely non-factory purposes.

In the present case, the hereditament is all occupied and used for the one trade or business—namely, a retail trade or business in bread and confectionery, for it cannot be doubted that the sale to hotels, clubs, restaurants, etc., is typical retail trade, and these sales, as also the orders given to roundsmen, are just part of the ordinary business of a retail shop. Similarly the bakehouse at the back of the shop, which makes the goods for the retail business, is an ordinary part of a retail baker's shop and, in my opinion, is merely ancillary to the trade or business carried on in the shop. I have no doubt, on the facts of this business, that the whole hereditament is used and occupied for the purposes of a retail baker's shop, and that there is no need to pray in aid any extended meaning given to " retail shop " by the special definition in sub-s. 4 of s. 3. It follows that the hereditament is not an industrial hereditament and should not be entered on the Special List.

The decision of the Court of Appeal, in agreement with the reasoning in some Scottish cases, to which we were also referred, was based on a separation of the bakehouse from the shop, and the inability to determine that the shop was the primary purpose. As already stated, I am of opinion that the dissection of a unified business such as is in fact carried on here is not justified. I prefer the reasoning of Lord Hunter in his dissent in *Inland Revenue* v. *Gunn, Collie & Topping* (1), where he says : " It may be contended with

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(1) 1930 S. C. 389, 401.

H. L. (E.) 1931 SEDGWICK v. WATNEY, COMBE, REID & CO. (AND SEVERAL OTHER APPELLANTS AND RESPONDENTS). THE INDUSTRIAL HEREDITAMENTS CASES. Viscount Dunedin.

force that, if a large part of the premises is devoted to the purposes of manufacture or adaptation of goods for sale, all that you can affirm is that the premises are partly used for the purposes of retail business. On the other hand, it may be said that, as nothing is manufactured or adapted for sale in any part of the premises, except for the purpose of satisfying the requirements of customers to whom goods have been sold retail, the primary purpose for which the building as a whole is used is the carrying on of a retail business. My own view is in favour of the latter construction. The manufacture or adaptation for sale of the cloth by making it into suits appears to me to be ancillary to the retail business of selling suits of clothing. I think the subjects ought to be treated as a retail shop, and ought not to appear in the Valuation-roll as industrial subjects."

Accordingly, the appeal should be allowed and the judgment of the King's Bench Division restored. The appellant to have the costs of this Appeal and the costs in the Court of Appeal. (1)

Order of the Court of Appeal reversed, and order of the King's Bench Division restored. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, March 6, 1931.

Solicitor for the appellant: *Treasury Solicitor.*
Solicitors for the respondents: *Neve, Beck & Crane.*

UNION COLD STORAGE COMPANY, LIMITED *v.* BANCROFT AND OTHERS.

My Lords, in this case the appellants are the occupiers of a hereditament in Manchester known as No. 60 Miller Street.

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(1) On March 23, 1931, in *Luton Revenue Officer* v. *Deeley* [1931] 1 K. B. 423, 509, which raised the same point, a similar order was made by consent.

The Assessment Committee placed the hereditament upon the Special List as an industrial hereditament.

The matter came before the Divisional Court by way of appeal upon a Special Case. The Divisional Court reversed the decision of the Assessment Committee and ordered the hereditament to be deleted from the Special List. An appeal from the Divisional Court to the Court of Appeal was dismissed.

The ground of decision both in the Divisional Court and in the Court of Appeal was that the hereditament was primarily occupied and used for purposes of storage within the meaning of the proviso to sub-s. 1 (*d*) of s. 3 of the Rating and Valuation (Apportionment) Act, 1928.

The appellants' name indicates the general character of the activities in which they are engaged.

The nature of the premises in question and the manner in which they are occupied and used appear from the following passages taken from the Special Case :—

" 10. The said hereditament comprises premises built by the Union Cold Storage Company, Limited, and opened for business in May, 1903. The building is of substantial and special construction, brick built and fireproof; it contains sub-basement, basement, ground floor and eight upper floors with condensing chamber with coils on the roof. . . . . The various floors are utilised as follows :—

(i.) Sub-basement : Boiler and engine room containing two boilers, two engines and two auxiliary engines, two compressors, two dynamos, two circulating pumps, etc. ; also refrigerating chamber No. 1 used for the refrigeration and/or refrigerated storage of bacon and fresh-killed meat. . . . .

(ii.) Basement : Upper floor of boiler and engine room and refrigerating chamber No. 2 used for the refrigeration and/or refrigerated storage of game and fish. . . . .

(iii.) Ground floor : Private and general offices, lavatory, loading way and refrigerating chamber No. 3 used for refrigeration and/or refrigerated storage of meat.

(iv.) First floor : Refrigerating chamber No. 4 used for refrigeration and/or refrigerated storage of various meat carcases and offal.

The registration notices as a "non-textile factory" are on this floor.

(v.) Second floor: Refrigerating chamber No. 5 used for general refrigeration and/or refrigerated storage; offal, tripe, liver, etc.

(vi.) Third floor: Refrigerating chamber No. 6 used for refrigeration and/or refrigerated storage of mutton, lamb, beef, butter, etc.

On the landing outside this chamber there is an electrical band saw for cutting up meat and carcases . . . . used for the purpose of trimming and cutting carcases for sale.

(vii.) Fourth floor: Refrigerating chamber No. 7 used for refrigeration and/or refrigerated storage of butter, liquid eggs and general merchandise.

(viii.) Fifth floor: Refrigerating chamber No. 8 the larger part of which is used for refrigeration and/or refrigerated storage of butter and a small part, recently partitioned off, for refrigeration and/or refrigerated storage of beef.

(ix.) Sixth floor: Refrigerating chamber No. 9 used for refrigeration and/or refrigerated storage of bacon, fish, etc.

(x.) Seventh floor: Refrigerating chamber No. 10 used for preserving eggs. . . . .

(xi.) Eighth floor: Refrigerating chamber No. 11 used for preserving eggs, and a special chamber and electric fan on this floor is set aside for defrosting eggs. Eggs are chilled under close supervision after careful stacking. Constant surveillance and instrument readings are essential and defrosting is carried out under like careful supervision, each egg being candled and examined before repacking for despatch.

11. The walls of all the refrigerating chambers are insulated by means of charcoal filled in between an outside and inside layer of timber. Such insulation consists of a wall 13 inches thick, comprising 9 inches charcoal impressed between thicknesses of tongued and grooved boards which are in turn insulated with waterproof paper. The process of refrigeration is carried out by means of the compression of ammonia and the circulation of expanded ammonia in a

complicated system of expansion pipes which are distributed throughout the premises. The system is known as a system of direct "expansion." Ammonia is compressed in the engines to a pressure of 150 lbs. to the square inch and forced into condensers which are erected on the summit of the building. . . . . In these condensers the ammonia liquefies and thereafter expands in the pipes causing a loss of heat in the process of expansion. The temperature in each chamber being subject to control.

The building contains two hydraulic lifts and is lighted by electricity generated by the company, but Corporation power is used for the electric band saw.

No ice is manufactured on the said hereditament.

. . . .

13. . . . . Chambers used in connection with meat. The processes carried on consist of freezing, chilling—an entirely distinct process not involving as in the case of freezing the destruction of any of the tissues of the meat under treatment—defrosting, trimming, cutting and preparation of carcases for sale, and on occasion special treatment of cargoes damaged in transit. A special charge is made for the processes by which produce is treated. . . . . It was agreed before the Respondent Assessment Committee that these charges greatly exceed the charges made by the proprietors of warehouse depositories for the storage of goods committed to their charge.

14. Approximately 25 to 30 per cent. of the produce received by the occupiers is fresh and requiring to be refrigerated before export or sale in distant markets, and the remainder, approximately 75 per cent., has been already refrigerated and is kept by the occupiers in that state.

15. The said hereditament is registered as a non-textile factory under the Factory and Workshop Acts.

16. In connection with the general controlling of the temperatures in the said premises an engineer's inspection is held four times in each twenty-four hours, and the engineer making such inspection issues and signs a log which is preserved for future reference.

. . . .

18. Meat, eggs, etc., subjected to refrigeration are not permitted to be sold as fresh. Frozen meat, chilled meat, fresh meat, fresh eggs and chilled eggs are recognised (in some instances by statute) as distinct marketable commodities."

The hereditament is registered as a non-textile factory under the Factory and Workshop Acts by reason of the presence thereon of the mechanically worked band saw for trimming and cutting carcases mentioned in the Special Case, but the other purposes for which the hereditament is occupied and used are admittedly the primary purposes, and the question is whether such other purposes are factory or workshop purposes, or fall within any of the categories (*a*) to (*f*) inclusive of sub-s. 1 of s. 3 of the Act of 1928.

Now, my Lords, I confess that upon first impression it is natural to conclude that premises occupied and used for storing goods until they are required by their owners are used primarily for purposes of storage, even though refrigeration by means of an elaborate process involving the use of machinery is necessary for the preservation of the goods during storage.

Your Lordships however heard from counsel for the appellants an ingenious argument to support the view that the processes by which goods are frozen, maintained frozen and defrosted amount to an altering or adapting for sale of the goods within sub-s. 1 (*c*), of s. 149, of the Factory and Workshop Act, 1901. It is pointed out that the freezing of some articles of food alters them by destroying tissue therein, that commercially all articles of food are altered by refrigeration in the respect that they cannot afterwards be sold as fresh, and that the several processes of freezing, maintaining frozen and defrosting are for the most part carried out in order that the goods may be preserved for sale at some future time or may be made capable of transport to a distant market, or having been preserved frozen for a future market may by defrosting be made available at the appropriate time for that market.

Upon this it is contended that the processes are really processes by which the goods are adapted for sale, even if

Viscount Dunedin.

not altered in the freezing or defrosting processes, because without the application to the goods of the appropriate process or processes they could not be sold in the particular market for which they are destined by their owners.

It may be difficult or impossible to identify the essential quality of the operation described in s. 149 of the Factory and Workshop Act, 1901, "as the adapting for sale of any article," nor in my view is it necessary for the purposes of this case to do so.

The phrase was probably introduced to secure somewhat more flexibility than is to be found in the immediately preceding terms—namely, "the altering, repairing, ornamenting or finishing of any article"—but it cannot in my judgment be stretched to cover the processes carried on by the appellants in the circumstances set out in the Special Case.

Upon the facts of the Special Case storage is beyond question, at any rate as to about three-fourths of the goods handled, the primary purpose for which the hereditament is occupied and used, and, though the processes in question, as applied to such goods, may alter them by affecting their quality, and though without their application the goods might not be available for sale in the markets in which they are in fact ultimately sold, yet it is as incidental to storage and to render storage possible and not otherwise that the processes are applied.

My Lords, in my judgment the Courts below were right in the conclusion at which they arrived, and this appeal should be dismissed with costs.

The several opinions that have been read are the opinions of the House.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 6, 1931.

Solicitors for the appellants: *Chas. H. Wright & Tracey.*
Solicitor for the respondent: *Treasury Solicitor.*

[HOUSE OF LORDS.]

H. L. (E.)* MINISTER OF HEALTH . . . . . APPELLANT;

1931

March 23.

AND

THE KING (ON THE PROSECUTION OF YAFFE) . . . . RESPONDENT.

Local Government—Unhealthy Area—Improvement Scheme—Scheme as presented to Minister for Confirmation defective—Order of Minister confirming Scheme with Modifications—Validity of Order of Minister—Certiorari—Housing Act, 1925 (15 *Geo.* 5, *c.* 14), *Part II.*, *ss.* 35, 36, 38, 39, 40, 46.

Sect. 40 of the Housing Act, 1925, which empowers the Minister of Health to make an order confirming, with or without modifications, an improvement scheme made under the Act, and provides that "the order of the Minister when made shall have effect as if enacted in this Act," does not preclude the Court from calling in question the order of the Minister where the scheme presented to him for confirmation is inconsistent with the provisions of the Act.

Institute of Patent Agents v. *Lockwood* [1894] A. C. 347 explained and distinguished.

The Corporation of Liverpool submitted to the Minister of Health for confirmation a document under the common seal purporting to be an improvement scheme under s. 35 of the Housing Act, 1925, in respect of an unhealthy area within the city. The first part of this document, after defining the area proposed to be dealt with, by clause 5, empowered the Corporation in general terms to make and widen and stop up or deviate any street in the area, directed them to appropriate other parts of the land to the erection of dwelling-houses for the working classes, and provided that any lands not required for these purposes might be disposed of as the Corporation might think fit. The second part contained estimates of the cost of acquiring the land and of the lay-out, and stated that there were no surplus lands.

The Minister, after holding a public local inquiry, made an order modifying the scheme by providing (inter alia), in lieu of clause 5, that the whole of the lands in the area should, subject to the provision of any necessary streets and approaches, be used for the purposes of rehousing, and confirming the scheme as so modified.

The owner of two houses which it was proposed to acquire compulsorily under the scheme on account of their sanitary condition obtained a rule nisi for a writ of certiorari to quash the order of the Minister as being made without jurisdiction, inasmuch as the scheme which the order purported to confirm was not an improvement scheme within the meaning of the Act in respect that (1.) it was not accompanied by a lay-out plan and (2.) it provided that land within the area might be disposed of as the Corporation might think fit:—

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* *Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

Held (by Viscount Dunedin, Lord Warrington of Clyffe, Lord Tomlin, and Lord Thankerton; Lord Russell of Killowen dissenting), that the scheme, whatever its defects, was an improvement scheme within the meaning of the Act, and that any defects in the scheme had been cured by the order of the Minister.

Rex v. *Minister of Health. Ex parte Davis* [1929] 1 K. B. 619 distinguished.

Decision of the Court of Appeal [1930] 2 K. B. 98 reversed.

APPEAL from an order of the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) allowing an appeal of the prosecutor Abraham Yaffe from an order of the Divisional Court (1), discharging by a majority (Lord Hewart C.J. and Talbot J.; Swift J. dissenting) an order nisi for a writ of certiorari to the appellant, the Minister of Health. The Court of Appeal ordered the issue of a writ of certiorari directed to the appellant to remove into Court to be quashed an order made by the appellant dated November 23, 1928, purporting to confirm a scheme known as the Liverpool (Queen Anne Street) Improvement Scheme, 1928, as modified and set out in the said order of the appellant.

The facts are stated in the report of the case in the Courts below and sufficiently appear from the opinion of Viscount Dunedin.

1931. Feb. 16, 17, 19, 20. *Sir William Jowitt A.-G.* and *The Hon. Sir Stafford Cripps S.-G.* (with them *W. Bowstead*) for the appellant. The appellant is not concerned to argue that the doctrine laid down by this House in *Institute of Patent Agents* v. *Lockwood* (2) would validate an order of the Minister under s. 40 of the Housing Act, 1925, if the preliminaries prescribed by the statute had not been observed or if further land had been taken. It is only within a limited scope that the authority of that case can be invoked, as where the order is within the general purview of the Act. That decision was distinguished by Palles C.B. in *Reg.* v. *Pharmaceutical Society of Ireland* (3), but the Chief Baron there confuses two

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(1) [1930] 2 K. B. 98.
(2) [1894] A. C. 347.
(3) [1899] 2 I. R. 132.

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distinct propositions of Lord Watson's, first, that the rules in question in that case were intra vires, and, secondly, that, whether they were or not, they were unassailable. It was followed in *Glasgow Insurance Committee* v. *Scottish Insurance Commissioners*. (1) It was distinguished in *Rex* v. *Electricity Commissioners* (2), which cannot easily be reconciled with the decision of the Court of Session. The appellant's case is that the scheme submitted to the Minister for confirmation was an improvement scheme within the meaning of the Act. Definite proposals are put before the Minister with full power to make such modifications as he may think necessary. The fact that the authority used an unfortunate phrase, which was cut out by the Minister, does not make the whole scheme bad. *Rex* v. *Minister of Health. Ex parte Davis* (3) is distinguishable, because in that case no proposals were put before the Minister, who was prohibited from proceeding further in the matter, inasmuch as the order of confirmation, when made, would have the force of an Act of Parliament. In the appellant's submission the scheme contemplated by the Act is not limited to the document referred to as the scheme, but includes the official reports which accompanied that document, and if the report of the housing director is to be looked at there can be no question as to the sufficiency of the scheme. Even if the scheme is simply the document to which the common seal is affixed it is a sufficiently good scheme to be capable of modification by the Minister.

Sir Leslie Scott K.C. and *H. A. Hill* (with them *T. Worthington Naylor*) for the respondent. Before the Minister can direct an inquiry, which is a condition precedent to confirmation, he must have before him a document which constitutes a scheme in compliance with the Act. Sect. 35 shows that the scheme must be for the rearrangement and reconstruction of the streets and houses within the area. There must be some broad indication in the scheme as to what rearrangement and reconstruction are contemplated, otherwise there would be nothing to inquire about. The people attending the inquiry, whether owners or ratepayers, are entitled to know generally how the area is going to be dealt with. This scheme bound the Corporation to nothing. In particular it has two defects. First, it gave an option to the Corporation not to reconstruct but to sell, and, secondly, no lay-out plan was attached to the scheme. The power of modification conferred on the Minister cannot be used to fill the gap caused by the non-performance of a condition precedent. That power is in its essence administrative, its purpose is to enable the minister to improve a scheme as a scheme, not to make something into a scheme which was not a scheme. It is said that the scheme submitted to the Minister included the official reports sent with it. But the improvement scheme can only mean the scheme prepared by the town clerk, and that contains nothing to show the intended development of the area. This case falls within the principle of *Davis's* case (1), for in both the Corporation might do as they liked. In *Davis's* case (1) there was no proposal for reconstruction. Here reconstruction is proposed, but it is not shown how the reconstruction is to be effected. Further the scheme as modified is still so wanting in precision as not to be a compliance with the Act.

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(1) 1915 S. C. 504.
(2) [1924] 1 K. B. 171.
(3) [1929] 1 K. B. 619.

Sir William Jowitt A.-G. replied.

The House took time for consideration.

1931. March 23. VISCOUNT DUNEDIN. My Lords, this is an appeal against the judgment of the Court of Appeal, which, reversing the judgment of the Divisional Court, restored the judgment of Swift J., quashing, in certiorari proceedings, an order made by the Minister of Health, appellant before your Lordships, confirming a scheme promulgated by the local authority of Liverpool under Part II. of the Housing Act, 1925, for the improvement of a certain area in that city.

It will probably be best, for clearness sake, to set forth, not the whole provisions of the Act which may be referred to, for that would be too lengthy, but those which form most directly the subject-matter on which the controversy turns.

The Housing Act, 1925, is a consolidating statute (15 Geo. 5,

(1) [1929] 1 K. B. 619.

c. 14) and is divided into five Parts. This case has chiefly to do with Part II., which is headed "Improvement and Reconstruction Schemes." Then, under a sub-heading "Improvement Schemes" comes s. 35, which is as follows: "35.—(1.) Where an official representation is made to a local authority as respects any area in the district of the authority either—

(*a*) that any houses, courts, or alleys within the area are unfit for human habitation, or

(*b*) that the narrowness, closeness and bad arrangement, or the bad condition of the streets and houses or groups of houses within the area, or the want of light, air, ventilation, or proper conveniences, or any other sanitary defects, or one or more of such causes, are dangerous or injurious to the health of the inhabitants either of the buildings in the area or of the neighbouring buildings; and that the most satisfactory method of dealing with the evils connected with such houses, courts, or alleys, and the sanitary defects in the area, is a scheme (hereinafter referred to as an improvement scheme) for the rearrangement and reconstruction of the streets and houses within the area, or of some of such streets or houses, the local authority shall take such representation into their consideration, and if satisfied of the truth thereof, and of the sufficiency of their resources, shall pass a resolution to the effect that the area is an unhealthy area and that an improvement scheme ought to be made in respect of the area, and after passing such a resolution they shall forthwith proceed to make a scheme for the improvement of the area."

Sect. 36 provides that the representation is to be made by the medical officer of health of the city: "38.—(1.) An improvement or reconstruction scheme of a local authority shall be accompanied by maps, particulars, and estimates, ...

39. As soon as an improvement or reconstruction scheme has been prepared the local authority shall forthwith—

(*a*) publish, in a newspaper circulating within the district of the local authority, an advertisement stating the fact of such a scheme having been made, the limits of the area comprised therein, and naming a place within that area or in the vicinity thereof where a copy of the scheme may be seen at all reasonable hours ; and

(b) serve a notice on every owner or reputed owner, lessee or reputed lessee, and occupier (except tenants for a month or a less period than a month) of any lands proposed to be taken compulsorily, so far as such persons can reasonably be ascertained, stating that such lands are proposed to be taken compulsorily for the purpose of such a scheme, and in the case of any owner or reputed owner, lessee or reputed lessees, requiring an answer stating whether the person so served dissents or not in respect of taking such lands.

40.—(1.) Upon compliance with the foregoing provisions with respect to the publication of an advertisement and the service of notices, the local authority shall present a petition to the Minister praying that an order may be made confirming such scheme.

(2.) The petition shall be accompanied by a copy of the scheme, and shall state the names of any owners or reputed owners, or lessees or reputed lessees, who have dissented in respect of the taking of their lands, and shall be supported by such evidence as the Minister may from time to time require.

(3.) The Minister after considering the petition may cause a local inquiry to be held, and, if satisfied on the report thereon that the circumstances are such as to justify the making of the scheme and that the carrying into effect of the scheme either absolutely, or subject to conditions or modifications, would be beneficial to the health of the inhabitants of the area in question or of the neighbouring dwelling-houses, may by order confirm the scheme with or without such conditions or modifications, so however that no addition shall be made to the lands proposed in the scheme to be taken compulsorily.

(5.) The order of the Minister when made shall have effect as if enacted in this Act.

(6.) It shall be the duty of the local authority to serve a notice of any order so made in the manner and upon the persons in which and upon whom notices in respect of lands proposed to be taken compulsorily are required by this Part of this Act to be served." (1)

"46.—(1.) Where land included in any improvement or reconstruction scheme made under this Part of this Act or the corresponding provisions of any Act repealed by this Act (other than land included in such a scheme only for the purpose of making the scheme efficient and not on account of the sanitary condition of the premises thereon or of those premises being dangerous or prejudicial to health) is acquired compulsorily, the compensation to be paid for the land, including any buildings thereon, shall be the value at the time the valuation is made of the land as a site cleared of buildings and available for development in accordance with the requirements of the building byelaws for the time being in force in the district:

Provided that, if in the opinion of the Minister it is necessary that provision should be made by the scheme for the rehousing of persons of the working classes on the land or part thereof when cleared, or that the land or a part thereof when cleared should be laid out as an open space, the compensation payable to all persons interested in any land included in the scheme (other than as aforesaid) for their respective interests therein shall be reduced by an amount ascertained as follows :—"

Then follows a somewhat elaborate calculation as to the reduction factor, which need not be gone into at length.

I will now briefly state the course of the case in the Courts below. I shall have to be much more explicit hereafter, but, for clearness sake, it is best to give what happened in an abbreviated form.

The certiorari proceedings were put in motion by one Abraham Yaffe, the proprietor of a house situate in the improvement area which, in the plan embodied in the scheme, was coloured pink, which meant that the buildings were considered insanitary and that he would only be paid for the site value. The ground of his complaint was, shortly, that there was not a scheme put forward in conformity with the requirements of the Act, and that consequently the Minister had nothing to confirm. And further it was eventually said that when he did confirm, with modifications, what was put before him, there still was no scheme which conformed to the Act, so that the so-called confirmation of the Minister was ultra vires, null, and ought to be quashed.

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(1) NOTE.—All the above quoted sections are repealed by the Housing Act, 1930.

The answer which was made by the Minister and the local authority was twofold. In the first place they said that the scheme, such as it was, having been confirmed by the Minister, his order by virtue of s. 40, sub-s. 5, had the position of an Act of Parliament, and could not be inquired into by the judges in certiorari proceedings. In the second place, it was said, not originally in the first Court, but in the Court of Appeal: (*a*) that the scheme was good as put before the Minister, and (*b*) that if there was any blot in it, that blot had been cured by the order of the Minister, so that the scheme, as it left his hands, was good and in conformity with the Act.

Now, before the Divisional Court it was held by a majority that the first argument was good. The order was protected as having the authority of an Act of Parliament. Swift J. dissented. He did not need to go into the second point, because at that time the Attorney-General admitted that the scheme, as presented, was bad. When the case came before the Court of Appeal the Attorney-General withdrew that admission, but of course still maintained his first point. On the first point the Court of Appeal reversed the judgment of the Divisional Court, and on the second point they held that the case was practically ruled by the case of *The King* v. *Minister of Health. Ex parte Davis* (1), and held the scheme bad.

The first question, and it is a very important and far-reaching one, is, therefore, as to the effect of s. 40, sub-s. 5. Has it the effect of preventing any inquiry by way of certiorari proceeding of a scheme confirmed by the Minister? It is evident that it is inconceivable that the protection should extend without limit. If the Minister went out of his

(1) [1929] 1 K. B. 619.

province altogether, if, for example, he proposed to confirm a scheme which said that all the proprietors in a scheduled area should make a per capita contribution of 5*l.* to the municipal authority to be applied by them for the building of a hall, it is repugnant to common sense that the order would be protected, although, if there were an Act of Parliament to that effect, it could not be touched. Now, the high water mark of inviolability of a confirmed order is to be found in a case in this House which necessarily binds your Lordships. It is the case of the *Institute of Patent Agents* v. *Lockwood.* (1) That case arose under the Patents, Designs, and Trade Marks Act. By that Act the Board of Trade was empowered to pass such general rules as they thought expedient for the purposes of the Act. Such rules were, "subject as hereinafter prescribed," to be of the same effect as if they were contained in the Act, and were to be judicially noticed. The "as hereinafter prescribed" was that the rules were to be laid before Parliament for forty days, and if, within forty days, either House disapproved of any rule, it was to be of no effect. The Board of Trade made rules as to the register of patent agents, which were laid before Parliament for forty days and were not objected to. The rules provided that an annual subscription should be paid by all registered patent agents, and prescribed a penalty for any one calling himself a patent agent who was not on the register. The respondent in the case, who was duly registered, refused to pay the subscription and was put off the register. He continued to practise and call himself a patent agent. The Institute of Patent Agents raised an action for a declaration and an injunction. In defence, the respondent pleaded that the rule was ultra vires of the Board of Trade. The House of Lords held that the provision as to the rules being of like effect as if they had been enacted in the Act, precluded inquiry as to whether the rules were ultra vires or not.

Now, there is an obvious distinction between that case and this, because there Parliament itself was in control of the rules for forty days after they were passed, and could have annulled them if motion were made to that effect, whereas here there is no Parliamentary manner of dealing with the confirmation of the scheme by the Minister of Health. Yet, I do not think that that distinction, obvious as it is, would avail to prevent the sanction given being an untouchable sanction. I think the real clue to the solution of the problem is to be found in the opinion of Herschell L.C., who says this (1): "No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment, and with regard to rules which are to be treated as if within the enactment. In that case, probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it."

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(1) [1894] A. C. 347.

What that comes to is this: The confirmation makes the scheme speak as if it was contained in an Act of Parliament, but the Act of Parliament in which it is contained is the Act which provides for the framing of the scheme, not a subsequent Act. If therefore the scheme, as made, conflicts with the Act, it will have to give way to the Act. The mere confirmation will not save it. It would be otherwise if the scheme had been, per se, embodied in a subsequent Act, for then the maxim to be applied would have been "Posteriora derogant prioribus." But as it is, if one can find that the scheme is inconsistent with the provisions of the Act which authorizes the scheme, the scheme will be bad, and that only can be gone into by way of proceedings in certiorari.

I doubt if prohibition will ever be found to be an appropriate remedy, but I will say more as to this subsequently. In the meantime, I only wish to say that I think the Court of Appeal was right in refusing to decide the case on the ground taken by the Divisional Court.

(1) [1894] A. C. 360.

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Now there arises the second question, and it must be apparent that, in accordance with the opinion which I have just expressed, the limits are narrow within which objection may be found. The respondent has here not got his mouth shut, as would have been the case if the argument which prevailed before the Divisional Court had been accepted. But he can only object with success if he can show that the scheme is a scheme which is not such a scheme as is contemplated and provided for by the Act. Sir Leslie Scott for the respondent was very anxious on this topic to put his argument in two ways. He said that the scheme, as ultimately approved, was not in accordance with the Act. But he also said, and this was the argument that prevailed in the Court of Appeal, that even if that were not so, at least the scheme as sent up to be approved was not in accordance with the Act, and that that being so, the Minister had no right to touch it. This latter argument depends to a great extent on what view is taken of the expression used in s. 40, sub-s. 3, which has been quoted. Now, the section says that the Minister has to consider whether the carrying out of the scheme "either absolutely, or subject to conditions or modifications," would be beneficial, and having so considered, that he then may, by order, confirm the scheme "with or without such conditions or modifications, so, however, that no addition shall be made to the lands proposed in the scheme to be taken compulsorily."

My Lords, the last words of limitation seem to me to show that otherwise the Minister is unfettered in the conditions which he may impose, or modifications he may make. I do not, of course, suggest that if there was something sent up which was really not a scheme at all, the Minister could confirm it. He is not the author of the scheme; he is the critic and the finisher of it. In particular he may, I think, remove any blot which he finds in it as presented, and in the word "blot" I include any provision which, if left untouched, would not be in conformity with the Act.

I therefore turn my attention first to the scheme presented. Put in a single sentence, the first objection argued by the learned counsel for the respondent was founded upon the words used in s. 35, sub-s. 1: "A scheme (hereinafter referred to as an improvement scheme) for the re-arrangement and the reconstruction of the streets and houses within the area," in view of the fact that the scheme did not include what he described as a "lay-out" plan. Before discussing this it will be well to see exactly what was done.

The matter began, as it should, by the medical officer of health reporting, on January 18, 1928, that a certain area, delimited in a schedule attached to the report, was insanitary, and ought to be dealt with by an improvement scheme. This report was submitted to the housing committee of the Council next day, who then made a recommendation to the Council, stating that they were satisfied of the truth of the representation of the medical officer, and recommending to the Council that they should order the town clerk to prepare a draft scheme, and get the land steward and acting director of housing to prepare the necessary plans and particulars. This recommendation was accepted by the Council on February 1, 1928. Acting on the instructions given, the housing director, on February 15, produced a report. The report sets out a scheme, in the form of various recommendations and estimates, and accompanied by plans. Plan No. 1, as the report bears, shows the Queen Anne Street area referred to in the official representation of the medical officer of health dated January 18, 1928, the insanitary property being coloured in pink. On this plan the acting director has indicated in blue the land and buildings which, in his opinion, it is essential to include for the efficiency of the scheme.

Plan No. 2 shows, coloured in yellow, the area in the scheme which will be cleared and developed for rehousing purposes. The suggested position of new dwellings is indicated on this plan in a slightly deeper print.

The estimate contained in the report was an estimate of 261,000*l*. for the cost of the buildings and general lay-out of the area. The report asked for approval of the scheme indicated, so that the details might be available to the town clerk in preparing his scheme. On the same date a separate report was obtained from the land surveyor, who estimated the cost of acquiring the ground, as set out in the plan, at 70,000*l*. On the same date the town clerk, having considered the reports, reported to the housing committee that he thought that the same might appropriately be dealt with by an improvement scheme. On the next day the housing committee approved of all the reports and approved of a scheme to be submitted to the Council. The scheme, as submitted, was just the various reports mentioned above. On March 7 the Council approved of this scheme.

The document to which the common seal is attached is headed, " Liverpool Queen Anne Street Improvement Scheme," and consists of five paragraphs and an estimate of expense, and has appended to it particulars and statements under five heads, in pursuance of general instructions by the Minister of Health as to applications for confirmation of improvement schemes. Para. 2, after certain definitions, concludes : " The plans referred to as ' the plans ' mean the plans accompanying this scheme." The plans which did accompany the scheme were a general plan of Liverpool, and plan No. 1 of the housing office report, showing the properties to be taken, coloured pink and blue respectively. Para. 3 gives a description, delimited by boundary, of the area proposed to be dealt with. Para. 5 is as follows : " After obtaining possession of the land authorised to be taken by this scheme, the Corporation may remove the whole of the buildings standing thereon, and may make and widen streets and approaches in such lines and situations as the Corporation may prescribe, and may stop up or deviate any street or streets included in any of the areas, and the Corporation shall appropriate other parts of the said land to the erection of dwelling-houses for the accommodation of such number of persons of the working class as, in the opinion of the Corporation, may require such accommodation, and any lands not required for the purposes aforesaid may be appropriated to such public purposes as the Corporation may direct, or be sold, leased, or otherwise disposed of, as the Corporation may think fit."

The estimates under the seal of the mayor give the two figures, for the acquisition of the land 70,000*l*., and for the construction of buildings 261,500*l.*, and then is added the statement, "No surplus lands."

The particulars state: "(ii.) The number of persons of the working class who will be displaced is, as nearly as can be ascertained, including lodgers, 2876 persons. The approximate rents paid by such persons are from 5*s.* to 15*s.* per week, free of rates and taxes.

(iii.) It is intended to provide accommodation for such number of those persons of the working class who will be displaced in the area affected by the scheme in such place or places either within or without the limits of the said area as the Ministry of Health, being the confirming authority within the meaning of the above Act, may require.

(iv.) After obtaining possession of the land the Corporation propose to remove the buildings standing thereon and afterwards to appropriate the land for the erection of suitable dwellings or for any other purpose that they may think desirable, or to dispose of the site by a sale in fee simple or by building leases, as they may deem to be most advantageous.

(v.) The area included in the official representation of the medical officer of health is coloured pink on the plans."

The Council then presented a petition to the Minister of Health to have the scheme confirmed. Along with the petition were enclosed all the reports already referred to, but the book of plans forwarded only included plan No. 1 of the housing report, and not No. 2. At the same time it was stated that, if the Minister wished any further information or copies of any documents referred to, they could be furnished by the director of housing.

Prior to the publication of the petition, a notice had been sent to all the owners and occupiers of houses in the area, indicating that the petition was going to be presented, and requesting them to signify assent or dissent. A list of the dissenting owners was sent to the Minister. The Minister then ordered a public inquiry. On March 9 an advertisement was put in the newspapers stating that an improvement scheme had been made, describing the area affected by that scheme, and stating that a copy of the scheme, accompanied by maps, particulars, and estimates, had been deposited at the town clerk's office and was open to inspection. The documents deposited were—a print of all the reports above detailed, a book of reference showing the names of the owners and occupiers whose land was to be taken, and a book of plans, which contained a general plan of Liverpool, and the plans showing the area with the parts coloured pink and blue respectively, and also a plan of the area which showed, by thick black lines, the proposed lay-out.

It was admitted by the respondent that he had called at the town clerk's office and seen certain plans. He denied in his affidavit that he had seen the last mentioned plan. The clerk in the town clerk's office, in his affidavit, said that he had, and that he had had the meaning of the colouring explained to him. The respondent, being one of the persons whose land was to be taken, the Minister of Health sent a letter on April 16, 1928, to him and others in the same position, in which it was explained to him that he could appear and object, and he was asked to state what his objection to the scheme was. It was also explained to him that, if the scheme was approved and his land taken, the amount of compensation would not be gone into at the inquiry, but that the basis of such compensation would be fixed, i.e., it would be decided whether his land should properly be coloured pink or blue. To this letter the respondent replied, by his law agents, on April 24, that his objection to the scheme was that his property was coloured pink instead of blue.

The inquiry was duly held on the first, second and third of May, 1928. It was conducted by Mr. Chapman, of the Board of Health, and in an affidavit by him, he explained that all the plans referred to in the housing report were before him, and were in the room during the inquiry, and that the whole discussion turned on the question whether the area, as a whole, was insanitary, and whether certain properties were properly coloured pink instead of blue.

After the inquiry was held, the Minister on November 23, 1928, confirmed the scheme, with modifications. The area was the area in plan No. 1. Clause 5 of this scheme was :

"The lands in the area shall, subject to the provision of any necessary streets and approaches, be used for the purposes of rehousing."

And clause 8: "The Council may, with the consent of and in accordance with plans to be approved by the Minister, lay out and construct new streets and widen existing streets in the area, and close or divert any highways in the area."

To turn now to the objections urged. They are really two in number. The first is that the scheme, as submitted to the Minister, did not contain a lay-out plan, and the second is that in clause 5 of the scheme, as originally presented, the Council was given untrammelled powers, a defect which the Minister had no right to cure.

As to the first objection, the Court of Appeal largely proceeded on the case of *Ex parte Davis*. (1) That was a case of prohibition, and a consideration of it raises the question as to whether prohibition is a proper remedy. But, on the merits, I think it is apparent that the case is utterly different from this. In that case the improvement scheme consisted in a power to take an area upon the ground that it was insanitary, and then to leave the municipality completely unfettered as to what it was to do with the ground taken. All that the Council was bound to do was to clear the area of buildings, and then "the whole of the cleared area shall be sold, leased, or disposed of as the Council may think fit," any application to the Minister of Health to devote it to purposes approved of by him being a mere alternative at the will of the Council. That that was no scheme under the Act was, I think, an inevitable conclusion. Whether it was properly dealt with by prohibition I will discuss presently. But the first thing is that it differs absolutely from the scheme in this case. Taking this scheme as authenticated by the corporation seal, it is apparent that the ground is to be used for a building scheme, that the cost of laying out the new streets and buildings is stated to be 261,000*l.*, and it is further stated that there is to be no surplus land.

(1) [1929] 1 K. B. 619.

The real objection which is urged is that it is a fatal defect in the scheme that it did not, as submitted to the Minister, include the lay-out plan. The expression "a lay-out plan" is nowhere to be found in the statute. What the objector urges is founded on the words of s. 35 (*b*): "A scheme (hereinafter referred to as an improvement scheme) for the rearrangement and reconstruction of the streets and houses within the area," and the argument is that that means that one essential of the scheme is a plan for reconstruction. What is a plan for reconstruction? That it is not such a plan as could be put in a builder's hands upon which he could proceed without further details is apparent, and is indeed excluded by the very words of the demand—"a lay-out plan."

It is not out of place to draw attention to an expression in s. 46, dealing with compensation. The proviso runs:—"Provided that if in the opinion of the Minister it is necessary that provision should be made by the scheme for the re-housing of persons of the working classes on the land or part thereof when cleared, *or that the land, or a part thereof, when cleared, should be laid out as an open space*, the compensation payable . . . ." That shows that an open space was one of the possibilities of a scheme so far as the cleared area is concerned.

But the best assistance is to be got from s. 38, which simply says that an improvement scheme shall be "accompanied by maps, particulars, and estimates," without in any way specifying what the maps are to be.

My view of the matter is that there is no cut and dried form in which a scheme must be propounded. The essentials are that it should clearly show the area which, in its present condition, is treated as the unhealthy area, and that, further, it should show that the municipality have bona fide proposals in sight, but that all particulars, and the precise form that reconstruction may take, are left over for the decision of the Minister, who can impose such conditions as he desires.

Now, when I apply this view to the facts in the present case, so far from finding something which resembles *Davis's* case (1), I find a very definite proposal. The scheme, as sent

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to the Minister, not only clearly showed that the cost of reconstruction had been minutely gone into, by the mention of the figure 261,500*l.*, but also that the whole area was going to be used for reconstruction by the fact that "no surplus land" was expressed, and it was accompanied, when sent, with all the reports, including the report of the housing director, which really gave every detail.

The objection finally resolves itself into this: that the book of plans only included the plan of the area, with the properties marked pink and blue, and did not include the plan marked in the report which showed the general layout of the new buildings, a plan which, mentioned as it was, could have been asked for by the Minister, and which, as a matter of fact, was sent to and seen by the official sent down to conduct the inquiry and report to the Minister what he should do. It is clear therefore that the Minister was fully aware of the general scheme as to how the cleared area was to be dealt with, when he granted the confirmation. As to the objector, he had the plan which showed it, and was the exact equivalent to the housing director's original plan in the scheme. He says he did not see it. The clerk to the town council says he did. I do not think it matters whether he saw it or did not ask to see it. The idea that he was concerned in the precise way that the area was going to be laid out does not commend itself to me as likely. His real interest, as fully disclosed in his solicitor's letter, was as to whether his ground should be coloured blue instead of pink. Unsuccessful in that, he wishes to wreck the scheme and remain the slum proprietor he is, and his attitude as to reconstruction is a lawyer's attitude suggested by his advisers, though, of course, quite legitimate if well founded.

As confirmed, the scheme seems to me unassailable. The area is delimited; the pink and blue colourings are settled. Then clause 5 says: "The lands in the area shall, subject to the provision of any necessary streets and approaches, be used for the purposes of re-housing." And then, as regards the streets the Minister keeps a firm hand on them, for the

Council can only lay them out in accordance with plans to be approved by the Minister.

So far, I have dealt with what may be styled the suggested sin of omission in the scheme. I now deal with what I may call a sin of commission, which forms the ground of the second objection urged. As proffered to the Minister, the scheme contained this clause: "After obtaining possession of the land authorised to be taken by this scheme the Corporation may remove the whole of the buildings standing thereon, and may make and widen streets and approaches in such lines and situations as the Corporation may prescribe, and may stop up or deviate any street or streets included in any of the areas, and the Corporation shall appropriate other parts of the said land to the erection of dwelling-houses for the accommodation of such number of persons of the working class, as, in the opinion of the Corporation, may require such accommodation, and any lands not required for the purposes aforesaid may be appropriated to such public purposes as the Corporation may direct, or be sold, leased, or otherwise disposed of, as the Corporation may think fit."

It was this clause that made several of the judges in the Court below say that they thought the case was ruled by *Ex parte Davis*. (1) I have already dealt with the clause in *Davis's* case, (1) and it is impossible, in my opinion, to say that this is the same. In *Davis's* case (1) the municipality need never have used the area for reconstruction at all. Here, under the clause, they must, and it is only the ground possibly not wanted for reconstruction which is left to their free will. But I will assume that this clause gives a wider freedom to the municipality than they ought to have. That wider freedom disappears in the scheme as confirmed. The whole area is accounted for in reconstruction, and it is clearly my opinion that, if the Minister finds a good scheme, but disfigured by a blot upon it which would make it possible to call the legality of the scheme in question, he is absolutely entitled to remove that blot. That, upon the supposition that this clause was a blot, he has done.

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(1) [1929] 1 K. B. 619.

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This brings me to discuss what I said I would revert to: the appropriateness of procedure by prohibition. I do not go the length of saying that prohibition can never be employed. I think in *Davis's* case (1) it was rightly employed, because there was there no scheme at all, and the Minister can only confirm a scheme; he cannot make one. But in the present case prohibition would, in my view, have been quite inappropriate, because, if successful, it would have prevented the Minister doing what I have already said I think he could legitimately do. It is also worthy of notice that one reason often repeated by the learned judges in *Davis's* case (1) for sanctioning prohibition was that, if prohibition was not granted, the matter became irremediable, because the confirming order had the effect of an Act of Parliament, and therefore could not be attacked. In other words, that proceedings by way of certiorari were impossible. But that, in the light of the former part of this judgment, in which I am aware all your Lordships agree, is not the case.

On the whole matter, I have therefore come to the conclusion that the scheme, as confirmed, is a good scheme, and that this appeal should be allowed, and that the judgment of the Divisional Court, although on very different grounds, should be restored.

I confess I am glad to be able to reach this result. No one could possibly look at these proceedings without being convinced that they are a genuine scheme for sweeping away an insanitary area and replacing the old by new and sanitary houses. There is no trace of any oblique motive. I should have been very sorry had I felt it necessary to frustrate the scheme and allow the continuance of the insanitary area for a longer period upon what at most was no more than a technical objection.

The appellant must have his costs in this House and in the Court of Appeal.

Lord Warrington of Clyffe. My Lords, by an order of the Court of Appeal dated April 10, 1930, that Court ordered that a writ of certiorari should issue directing the appellant to remove into the Court to be quashed an order made by the appellant and dated November 23, 1928, confirming a scheme known as the Liverpool (Queen Anne Street) Improvement Scheme, 1928, as modified and set out in such order.

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(1) [1929] 1 K. B. 619.

The order of the Court of Appeal reversed an order of the King's Bench Division dated January 14, 1930, whereby that Court by a majority (the Lord Chief Justice and Talbot J.; Swift J. dissenting) discharged a rule nisi for a certiorari obtained by the above named Abraham Yaffe.

The order of the Minister purported to be made under s. 40 of the Housing Act, 1925. That section provides (sub-s. 5) that the order of the Minister when made shall have effect as if enacted in the Act. It was contended before the King's Bench Division, and the contention was accepted and acted on by the majority of the judges, that the validity of such an order, being equivalent to an Act of Parliament, could not be questioned in the Court, even though, as was admitted in that Court, the order was ultra vires the Minister by reason of the non-fulfilment of certain statutory conditions precedent to the Minister's authority.

In the Court of Appeal and in this House the Attorney-General withdrew the admission made by him in the King's Bench Division as to the invalidity of the scheme, and it was not seriously denied that if the statutory conditions were not fulfilled the Minister would have no authority to make the order, and that the question as to the fulfilment of such conditions was open to inquiry in the Court.

I think it is quite clear that to this extent the validity of the order is open to question.

On this point the case which gave some trouble to the Courts below was the case of *Institute of Patent Agents* v. *Lockwood*. (1) In that case the Board of Trade had power to make "such general rules as are in the opinion of the Board required for giving effect to this section"—namely, a section providing for the registration of patent agents—and such rules were to be of the same effect as if they were contained in a previous Act relating to the registration of trade marks and to be judicially noticed. It was held that the validity of a rule imposing fees on registration could not be questioned. But this was on the footing that the rules were within the statutory authority, as being rules which the Board of Trade thought reasonable and necessary for giving effect to the section in question: see per Lord Herschell L.C. (1) But the same learned Lord points out (2) that there is a difference between a rule and a statute, inasmuch as " you may canvass a rule and determine whether or not it is within the power of those who made it, you cannot canvass in that way an Act of Parliament." Lord Watson also (3), while coming to the conclusion that the validity of the rules could not be questioned, did so on the assumption that they were made in pursuance of the section in question. So far therefore from being an authority against the proposition stated above it is in favour of it, and I therefore proceed to consider whether or not the conditions giving authority to the Minister were in this case fulfilled.

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(1) [1894] A. C. 347.

It is unnecessary to set out again the several sections and sub-sections on which the question turns, and I propose at once to state the steps taken by or on behalf of the local authority, in this case the Corporation of Liverpool, and then to consider whether they were a sufficient compliance with the requirements of the Act so as to authorize the Minister to make the order in question.

On January 18, 1928, an official representation, such as is described in s. 35, sub-s. 1, of the Act was duly made, and, on January 19, 1928, the housing committee passed the prescribed resolution, and this was confirmed by the Council on February 1, 1928.

On February 15 Mr. L. H. Keay the acting director of housing reported that he had prepared a draft scheme. This he describes in considerable detail and illustrates by reference

(1) [1894] A. C. 356. (2) [1894] A. C. 360.
(3) [1894] A. C. 365.

to a number of plans. This document in my opinion complies sufficiently with the provisions of s. 38 as to the contents of an improvement scheme. On this point I may say here that in my opinion the words "proper sanitary arrangements" in s. 38, sub-s. 1, do not refer to such matters as drains, sewers, privies and so forth, which are dealt with in the Public Health Acts and other similar statutes, but rather to the wider sanitary arrangements referred to in s. 35. Read in this sense the provision is amply complied with by Mr. Keay's report. He also includes an estimate of the cost of the buildings, the lay out of playgrounds, open spaces, street and sewer works, etc., at 261,500*l.*

On the same date the land steward reported that the estimated cost of acquiring the land was 70,000*l.*, and the town clerk reported that the area might conveniently be dealt with by an improvement scheme under the Act.

On February 16, 1928, the town clerk submitted to the housing committee the several reports above mentioned. He at some time prepared a draft of the scheme, subsequently sealed by the Corporation, the form of which has given rise to the present difficulties. Whether this draft was submitted to the committee on February 16 is not clear. A print is pasted into the minute book of the committee together with the reports, etc., unquestionably submitted at the meeting. However this may be, the committee resolved "that it be recommended to the Council that the improvement scheme now submitted together with the plans, particulars and estimates relating to the said scheme be and the same are hereby made and adopted and that all necessary steps be taken to obtain confirmation thereof."

This minute is curiously worded, but it seems to mean that the Council should be recommended to pass a resolution of their own in the terms of that set out in the minute.

The matter came before the Council at their meeting on March 7. It is again difficult to make out exactly what happened, but the report of the housing committee was received and adopted, and I think this was equivalent to an adoption by the Council not only of the draft "scheme" prepared by the town clerk but of the plans, particulars and estimates thereto.

The seal of the Corporation was thereupon affixed to the document printed at pp. 85 and 86 of the Appendix, and was attested by the lord mayor and the town clerk.

This was an unfortunate document, and has given rise to the present litigation.

In the first place only one plan was referred to, and this, while showing the lands to be taken compulsorily for the purpose of the scheme as coloured pink and blue, being the conventional mode of indicating the manner in which compensation was to be assessed under s. 46, sub-s. 1, did not in any way show, as did the plans referred to by Mr. Keay in his report, the sites of the proposed new streets and buildings. In the next place by clause 5 it purported to give the Corporation power to prescribe the lines and situation of the widened streets and approaches, and also provided that the number of persons of the working class to be provided for by the appropriation of other parts of the area to the erection of dwelling-houses should be such number of those persons as, in the opinion of the Corporation, might require such accommodation. It also most unfortunately contained a provision that "any lands not required for the purposes aforesaid may be appropriated to such public purposes as the Corporation may direct or be sold leased or otherwise disposed of as the Corporation may think fit." At the same time however, under the head "Estimate of Expense," the document repeated Mr. Keay's estimate of 261,500*l.* for the cost of laying out and the construction of new streets and the erection of new buildings, and contained the statement "no surplus land."

In another document headed "Particulars and Statements," prepared in pursuance of general instructions given to local authorities by the Ministry of Health, the number of persons to be displaced was stated to be 2876, the number mentioned in Mr. Keay's report. This document is printed below the seal of the Corporation, and it is not clear whether it formed part of the "scheme" or was on a separate paper, but at any rate it emanates from the Corporation.

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Whatever the defects of the "scheme," however, it was in my opinion a "scheme for the re-arrangement and reconstruction of the streets and houses within the area or some of such streets and houses," and was therefore an improvement scheme within the meaning of the Act, and might have been submitted to the Minister for confirmation. But in my opinion on the facts above stated the real scheme adopted by the Corporation was not the document so called by itself, but included the definite proposals embodied in Mr. Keay's report and the plans referred to therein, and this scheme was certainly within the Act.

The next step taken by the Corporation was to publish the advertisement required by s. 39 (*a*) of the Act and to give the notices required by s. 39 (*b*).

In pursuance of the advertisement a copy of the "scheme," accompanied by the "particulars and estimates," was deposited at the office of the town clerk. There were also deposited there amongst other things a print of Mr. Keay's report and a map (No. 7) showing in thick black lines the proposed lay out. The clerk in charge explained, he says, to all comers that the thick black lines indicated the proposed lay out. The other plans and sketch plan elevations annexed to Mr. Keay's report were open to inspection at the office, adjoining that of the town clerk, of the director of housing, and some persons requiring further information were referred to that office. In my opinion the information given by the deposited documents was a sufficient compliance with the statutory requirements in that behalf.

The Corporation then presented to the Minister the necessary petition for confirmation of the scheme. This was accompanied amongst other things by copies of Mr. Keay's report and a plan (No. 2) showing the area with the lands, etc., coloured pink and blue. The other plans showing lay out, etc., referred to in the report were not sent. When these last mentioned plans came into possession of the Minister is not clear, but the officer who presided at the public inquiry says that they were placed before him before he opened the inquiry.

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The Minister having received the petition directed a local inquiry to be held, and this was done.

He then made the order printed at pp. 104 and 105 of the Appendix. The scheme he purported to confirm was that set out in the Schedule to the order. It is unnecessary to consider the details of the modified scheme; it is enough to say that the whole of the land subject to the provision of necessary streets and approaches was to be used for the purposes of rehousing, thus eliminating the objectionable provision above referred to as to the use of land not required for that purpose. The Minister had ample power to confirm the scheme of the Corporation with or without conditions or modifications, and I can find nothing in the order which can be said to exceed the authority conferred upon him.

As appears above, I am of opinion that there was submitted to the Minister a sufficient improvement scheme, and that the other conditions the fulfilment of which was necessary to give him authority to make the order were fulfilled, and accordingly that the validity of it cannot be questioned. The result is that in my opinion the order of the Court of Appeal must be discharged and that of the Divisional Court restored with costs here and in the Court of Appeal.

I would add that *Ex parte Davis* (1) proceeded on the footing that no scheme within the Act had been presented to the Minister, and he therefore had no authority to make an order. In the present case there was in my opinion such a scheme, and consequently *Ex parte Davis* (1) is not in point. That being so, I prefer to express no opinion on the question whether that case was rightly decided. The point has not been argued, and so far as I am concerned I prefer to leave it open.

LORD TOMLIN. My Lords, the first question for consideration is whether by reason of sub-s. 5 of s. 40 of the Housing Act, 1925, your Lordships are precluded from inquiring into the validity of the order made by the Minister of Health on November 23, 1928.

(1) [1929] 1 K. B. 619.

Upon this matter I entertain no doubt. The Minister's jurisdiction to make an order is under the Act strictly conditioned, and it is only when what is done falls within the limits of the conditions imposed that the order receives the force conferred by the sub-section in question. When the legislature seeks to produce a broader result other language is employed, as is well illustrated by the phraseology of clause 2 of the Third Schedule of the Act now under consideration.

This view does not deprive the sub-section of effect. Without the sub-section the legal operation of the Minister's order would remain undefined.

Nor is there in my judgment anything in the decision of your Lordships' House in *Institute of Patent Agents* v. *Lockwood* (1) to preclude your Lordships from attributing to the sub-section the meaning which I have indicated.

It is therefore in my opinion permissible and necessary to consider the following further questions—namely, (1.) whether or not the conditions founding the Minister's jurisdiction were fulfilled in the present case; and (2.) whether or not the order made by him is in relation to its contents intra vires.

Upon the first of these questions it is urged by the respondent that there never was in existence an improvement scheme made by the local authority within the meaning of the Act, and that therefore there was nothing with which the Minister could deal.

The language of s. 35 of the Act makes it I think plain that any improvement scheme made by a local authority must be a scheme for the rearrangement and reconstruction of the streets and houses within the area in respect of which an official representation has been made or some of such streets or houses. The problem is to ascertain what are the essentials of such a scheme.

An examination of the relevant sections of the Act discloses but little that assists to determine these essentials.

Under s. 38, sub-s. 1, the scheme must be "accompanied by maps, particulars and estimates," and under the same section there are three imperative directions and no more with regard to its contents—namely, (1.) it shall provide for proper sanitary arrangements; (2.) it shall distinguish the lands proposed to be taken compulsorily; and (3.) it shall, if the Minister so requires (but it shall not otherwise be obligatory on the local authority so to frame their scheme), provide certain accommodation for the working classes. This third direction obviously does not require the scheme in its inception to provide accommodation for the working classes.

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(1) [1894] A. C. 347.

The same section provides that the scheme may (amongst other things) include any neighbouring lands if the local authority are of opinion that such inclusion is necessary for making their scheme efficient.

It is further to be observed that the proviso to sub-s. 1 of s. 46 (a section dealing with compensation and fixing different standards of compensation for land included to make the scheme efficient and for other land) seems to imply that the Minister may if he thinks it necessary require all the land covered by the scheme either to be used for the rehousing of persons of the working classes or to be laid out as an open space, but this again cannot bear upon the essentials which the local authority have in the first instance to insert in the scheme.

Upon this material I draw the conclusion that in addition to complying with the imperative directions affecting its initial form the scheme with its particulars must be framed by the local authority, so as to provide for the rearrangement and reconstruction of some of the streets or houses in the area with such amount of detail as will give a general idea of what is proposed, and that it must distinguish the lands included to make the scheme efficient from the other lands. I do not however think that all this matter need appear in one document. Indeed, the Act seems to regard the scheme as something containing only a general proposition the details of which will appear in the accompanying documents.

My Lords, having ascertained as nearly as may be what the Act requires the scheme to contain it becomes necessary to consider what in fact was done in the present case, a matter not wholly easy by reason of the artlessness with which the local authority conducted their proceedings and fashioned their documents.

On January 18, 1928, the medical officer of health of the City of Liverpool made an official representation in respect of an area in the city called the Queen Anne Street area, and represented that the most satisfactory method of dealing with the evils connected with the area was an improvement scheme for the rearrangement and reconstruction of the streets and houses within the area or some of such streets and houses.

On January 19, 1928, the housing committee of the Liverpool Corporation considered the representation, and resolved as follows :—

" That it be recommended to the Council that the Council, having taken into consideration the official representation of the Medical Officer of Health, dated the 18th day of January, 1928, and being satisfied of the truth thereof and of the sufficiency of their resources, declare that the area described in such representation is an unhealthy area, and that an improvement scheme ought to be made in respect of such area " ; and " That it be recommended to the Council that the Town Clerk be instructed to prepare a draft scheme, and take all other requisite steps to carry the same into effect under, and in accordance with, the provisions of Part II. of the Housing Act, 1925, and that the land steward and surveyor and the acting director of housing prepare the necessary plans, particulars and estimates."

On February 1, 1928, the City Council adopted the recommendations of the housing committee.

On February 15, 1928, four reports were signed—namely, (1.) a report by the medical officer reporting (inter alia) the number of houses in the area and the total population.

(2.) A report by the land steward and surveyor to the effect that the cost of acquiring the land, including compensation for disturbance and costs, was estimated at 70,000*l.*

(3.) A report by the town clerk that the area might be conveniently dealt with by an improvement scheme under Part II. of the Housing Act, 1925.

(4.) A report by the acting director of housing to which I shall hereafter refer as the director's report.

This last mentioned report is of capital importance in the case.

It begins by stating that pursuant to the resolution of the housing committee, confirmed by the City Council on February 1, 1928, the director reports that he has prepared a draft scheme, details of which are set out thereunder and which is illustrated by plans submitted with the report.

There were five of such plans. Plan No. 1 showed in pink the insanitary area and in blue the other land which the director considered necessary for the efficiency of the scheme. The land coloured blue included (inter alia) land in Holly Street not adjoining the land coloured pink.

Plans Nos. 2 and 3 showed the proposed new lay out of houses and streets and open spaces.

Plan No. 4 showed the existing buildings on the land affected by the scheme, and plan No. 5 showed in sketch the principal elevations of the proposed new buildings.

The report gave full details of the area of the land to be acquired, the total number of persons to be displaced by the scheme—namely, 2876—the number of persons to be provided for under the scheme—namely, 2146—the number of dwellings to be erected with the nature of the accommodation to be provided therein, and particulars of other buildings to be erected.

The report estimated the cost of the buildings, lay out of the necessary playgrounds, open spaces, streets and sewer works, street lighting and tree planting, at 261,500*l.*

There was a note on the report to the effect that plan No. 2 together with plan No. 1 would accompany the particulars to be forwarded to the Minister of Health in connection with the official representation of the scheme. By some oversight plan No. 2 was not in fact forwarded to the Ministry of Health with the other documents.

There can be no doubt that the director's report contained a proposal which if in fact presented to the Minister as part of the scheme of the Corporation would, so far as details of the rearrangement and reconstruction of streets and houses were concerned, have been adequate to give the Minister jurisdiction to proceed.

By reason of the manner in which the minutes of the City Council and its housing committee are kept it is not made clear what happened next, but the course of events was, I infer, as follows:—

Contemporaneously with the preparation of the reports to which reference has been made the town clerk had prepared two documents.

One document which I will call the town clerk's draft was headed as follows:—

"CITY OF LIVERPOOL.

The Housing Act, 1925.

LIVERPOOL (QUEEN ANNE STREET) IMPROVEMENT SCHEME, 1928.

Scheme made by the Lord Mayor, Aldermen and Citizens of the City of Liverpool, acting by the Council as the Local Authority under Part II. of the Housing Act, 1925, for the Improvement of an Unhealthy Area within the City of Liverpool."

It was framed with two parts, the first of which contained five clauses and the second of which contained four clauses.

Clause 1 of the first part was as follows: "This scheme may be cited as the Liverpool (Queen Anne Street) Improvement Scheme, 1928." Clause 2 contained some definitions, among which the expression "the plans" was defined as meaning "the plans which accompany this scheme." In fact the only plans which went in the first instance to the Ministry with the scheme were an ordnance survey map of Liverpool and plan No. 1 of the director's report. Clause 3 defined the area included "in this scheme," being in fact the area to be comprised in the scheme under the proposal in the director's report. Clauses 4 and 5 were as follows:—

"4. The Corporation may enter upon and take compulsorily and deal with for the purpose of this scheme all or any of the lands referred to in this scheme and coloured pink and blue on the said plan.

5. After obtaining possession of the land authorized to be taken by this scheme the Corporation may remove the whole of the buildings standing thereon, and may make and widen streets and approaches in such lines and situations as the Corporation may prescribe, and may stop up or deviate any street or streets included in any of the areas, and the Corporation shall appropriate other parts of the said land to the erection of dwelling-houses for the accommodation of such number of persons of the working class as, in the opinion of the Corporation, may require such accommodation, and any lands not required for the purposes aforesaid may be appropriated to such public purposes as the Corporation may direct, or be sold, leased, or otherwise disposed of, as the Corporation may think fit."

The lands coloured blue included the lands in Holly Street.

Clause 5 has been much commented on, and I will say a word about it later on.

The second part of the same document was headed, "Estimate of Expense," and its four clauses were as follows :—

"1. The estimated cost of acquiring the lands and buildings shown upon the deposited plan, and coloured pink and blue, in accordance with section 46 of the Housing Act, 1925, including the cost of and incidental to the making and confirmation of the scheme, is the sum of 70,000*l*.

2. The estimated cost of laying out and the construction of new streets and the erection of new buildings is the sum of 261,500*l*.

3. No surplus land.

4. No recoupments."

The plan referred to in clause 1 of this second part as the deposited plan was undoubtedly plan No. 1 of the director's report. The figures in clauses 1 and 2 are taken from the report of the land steward and the director's report respectively.

The other document was prepared by the town clerk to satisfy certain official requirements of the Ministry. I will call it the official particulars. It was headed as follows :—

"PARTICULARS AND STATEMENTS.

In pursuance of the instructions of the Ministry of Health, dated October, 1919, as to Applications by Urban Sanitary Authorities for the confirmation of Improvement Schemes.

(The paragraphs are numbered to correspond with the instructions of the Ministry of Health.)"

It contained five clauses. The first gave the superficial contents of the area affected by the scheme, being the area dealt with by the director's report. The second stated the number of persons of the working classes to be displaced to be 2876 and the amount of the rents paid by them. The third stated that it was intended to provide accommodation for such number of those persons of the working class who would be displaced at such place or places, either within or without the area, as the Minister might require. The fourth was as follows : "After obtaining possession of the land the Corporation propose to remove the buildings standing thereon and afterwards to appropriate the land for the erection of suitable dwellings or for any other purpose that they may think desirable or to dispose of the site by a sale in fee simple or by building leases as they may deem to be most advantageous."

The fifth clause was as follows :—

"(v.) The area included in the official representation of the medical officer of health is coloured pink on the plans.

The area included in the improvement scheme is the same as that included in the official representation, which is coloured pink on the plans, together with the lands coloured blue thereon, which are included for the purpose of making the scheme efficient, under section 38 (1.) (*a*) of the Housing Act, 1925.

A book of reference to the deposited plans, in duplicate, accompanies this scheme.

Particulars of the area included in the scheme are given in the book of reference and the plans.

No lands comprised in the area in respect of which the official representation was made have been excluded from the area of the improvement scheme by the Corporation.

All the lands included in the areas of the improvement scheme are intended to be taken compulsorily, and are coloured pink and blue on the plans."

On February 16, 1928, there was a meeting of the housing committee at which the several reports of February 15, including the director's report and the two documents prepared by the town clerk, were submitted. It was then resolved that the reports be approved, and it was also resolved: "That it be recommended to the Council that the improvement scheme under Part II. of the Housing Act, 1925, now submitted, for the improvement of the Queen Anne Street unhealthy area, together with the plans, particulars, and estimates relating to the said scheme, be, and the same are, hereby made and adopted, and that all necessary steps be taken to obtain confirmation thereof."

The City Council met on March 7, 1928, and approved the recommendation of the housing committee of February 16, 1928, and on the same day the seal of the Corporation was affixed to the town clerk's draft.

On or about March 9, 1928, pursuant to s. 39 of the Act, the Corporation: (1.) published in a local paper an advertisement of the Liverpool (Queen Anne Street) Improvement Scheme, 1928, stating in the advertisement that the said scheme, accompanied by maps, particulars and estimates, had been deposited at the office of the town clerk and might be seen at all reasonable hours, and (2.) served on the owners and occupiers the necessary notices with regard to the lands proposed to be taken compulsorily.

At about the same time there were deposited at the town clerk's office for public inspection the following documents—namely, prints of the town clerk's draft, of the official particulars, of the official representation by the medical officer of health, of the director's report, and the other three

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reports of February 15, 1928, and of the book of reference containing the names of owners and occupiers of the lands proposed to be taken, a plan of the area corresponding with No. 1 plan of the director's report, but with the position of the proposed new buildings shown by superimposed black lines, and a book of plans consisting of (1.) general ordnance survey of the City of Liverpool, and (2.) plan No. 1 of the director's report. All who inspected these documents and desired to see the other plans referred to in the director's report were shown them.

On April 4, 1928, the Corporation petitioned the Minister for an order confirming the scheme made by them. The documents forwarded to the Ministry were copies of the deposited documents other than the plan with the superimposed black lines. This plan was in fact sent to the Ministry after the public inquiry had been held.

The Minister directed a public inquiry, and the same was held on the first three days in May, 1928.

At the inquiry all the plans referred to in the director's report were before the officer holding the inquiry.

Now the question is what was the scheme made by the Corporation. I have no doubt that so far as rearrangement and reconstruction of streets and houses was concerned it was the scheme outlined in the director's report. The town clerk's draft and the official particulars were not intended to be read except with the director's report and the other reports of February 15, 1928. Without such other reports they were unintelligible. Clauses Nos. 2 and 3 under "estimate of expense" in the town clerk's draft are meaningless without the director's report, and in fact these two documents were throughout and everywhere accompanied by the director's report and the other reports of February 15, 1928. They were all deposited together. They were sent to the Ministry together. At no stage was any mind addressed to the problem of the scheme without all these documents being present. A plan showing the position of the new buildings was among the deposited documents, and all the plans referred to in the director's report were produced to all who inspected that report and desired to see such plans. Moreover (and this to my mind affords strong support to the view which commends itself to me), the housing committee on February 16, 1928, approved the director's report, and the other three reports of February 15, 1928, and this approval is in my view meaningless unless the proposal contained in the director's report was being embodied in the scheme.

But it is said that even if for ascertaining what the scheme was it is permissible to regard all the documents to which I have referred still there is clause 5 in the town clerk's draft and clause 4 in the official particulars, and that these clauses in effect leave the City Council free to do anything they please with the land, and that the scheme was therefore no improvement scheme at all.

In the first place I am not satisfied that the clauses in question have the effect contended for.

Reading the two documents together, and in the light of the director's report and other reports which accompanied them, it is plain to my mind that what was proposed was to acquire the land coloured pink and blue on plan No. 1 of the director's report, to clear it, and to build thereon at the cost of 261,500*l.*, the figure mentioned in the director's report, the new streets and buildings described in such report, leaving no surplus lands available.

The impeached clause 5 in the town clerk's draft seems to me to put upon the City Council an obligation to build some dwelling-houses on the land, and therefore to contain enough, taken alone, to make the scheme an improvement scheme. If this be so, I do not see how the presence of the provisions as to sale and the like contained in the same clause and in clause 4 of the official particulars deprives what would otherwise be an improvement scheme of the quality of an improvement scheme.

But however this may be, the primary purpose as shown by the deposited documents taken together was clearly in my opinion to carry out the director's proposal, and if that proposal was adequate to constitute an improvement scheme, as no doubt it was, the presence of a clause (which the

Minister could strike out under his power to modify) weakening or destroying the obligation of the City Council to carry out the primary purpose ought not, in my opinion, to be allowed to render the whole proceeding nugatory. Such a conclusion to my mind is not required by the language of the Act.

It is not suggested that the scheme of the local authority did not in other respects comply with the imperative directions of the Act, and if the view I take is correct there is no ground left for supporting the contention that there was no improvement scheme within the meaning of the Act presented to the Minister.

In the Court below the case appears to have been regarded in relation to the point I have just considered as on all fours with the Derby case: *Rex* v. *Minister of Health. Ex parte Davis.* (1) In the Derby case, so far as I understand the facts, there was no proposal at all for the rearrangement and reconstruction of the streets and houses within the area or any of such streets or houses. Upon the view which I take of the facts of the present case the position differs toto cœlo from that in the Derby case, the consideration of which therefore is not called for here.

There remains the question whether the scheme confirmed by the Minister having regard to its contents is itself open to objection.

The Minister made an order on November 23, 1928, confirming the scheme of the local authority as modified and set out in the schedule to the order. The scheme confirmed is free of the objectionable clauses. The land in Holly Street was struck out of the confirmed scheme and some of the pink land was therein turned to blue. Further by the terms of the scheme as confirmed the land in the area (subject to the provision of any necessary streets and approaches) is appropriated to the purposes of rehousing. It was but faintly argued that the scheme as confirmed was in respect of its terms impeachable and I am unable to find any ground for so holding.

(1) [1929] 1 K. B. 619.

My Lords, for the reasons which I have endeavoured to indicate, I think the appeal succeeds and that the order of the Court of Appeal should be reversed and that the order of the King's Bench Division discharging the order nisi should be restored.

LORD THANKERTON. My Lords, the appellant first challenges the jurisdiction of a Court of law to entertain any question as to the validity of the confirming order made by him in this case under sub-s. 3 of s. 40 of Housing Act, 1925, in respect that sub-s. 5 of that section provides that "the order of the Minister when made shall have effect as if enacted in this Act."

The relevant sections of the Act have already been sufficiently recited, and these show that certain preliminary steps are expressly prescribed before the stage of confirmation by the Minister is reached. There is to be an official representation followed by a resolution of the local authority in terms of s. 35, and the section prescribes that the local authority shall forthwith proceed to make a scheme for the improvement of the area. Under s. 38 the contents of such scheme are indicated, but it is prescribed that the scheme shall be accompanied by maps, particulars and estimates, and that it must provide for proper sanitary arrangements, and must distinguish the lands proposed to be taken compulsorily. Under s. 39, as soon as the scheme has been prepared it must be published as directed, and notices must be served on persons interested in the lands proposed to be taken compulsorily; the notices are to require an answer stating whether the person so served dissents or not in respect of taking such lands.

That completes the preliminary steps to be taken by the local authority, and s. 40 deals with the transmission of the scheme to the Minister, and the duties and powers of the Minister in relation thereto. For the present purpose I note first that "upon compliance with the foregoing provisions with respect to the publication of an advertisement and service of notices," the local authority are directed to present

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a petition to the Minister praying that an order may be made confirming such scheme, and, secondly, that sub-s. 3 makes it clear that the Minister must cause a local inquiry to be held and receive its report before he confirms the scheme, whether with or without modifications.

It is agreed that, in the absence of the provision in sub-s. 5 of s. 40, if the Minister made a confirmation order either (1.) of a scheme which really bore no relation to Part II. of the Act, or (2.) for instance, where lands were proposed to be taken compulsorily and no notices had been served under s. 39, or no local inquiry had been held, the Court would be entitled to decide as to the validity of the order. The question here is whether sub-s. 5 excludes the jurisdiction of the Court.

In this case, as in similar cases that have come before the Courts, Parliament has delegated its legislative function to a Minister of the Crown, but in this case Parliament has retained no specific control over the exercise of the function by the Minister, such as a condition that the order should be laid before Parliament and might be annulled by a resolution of either House within a limited period. In my opinion the true principle of construction of such delegation by Parliament of its legislative function is that it only confers a limited power on the Minister, and that, unless Parliament expressly excludes the jurisdiction of the Court, the Court has the right and duty to decide whether the Minister has acted within the limits of his delegated power. An illustration of such an express exclusion of the jurisdiction of the Court is found in the provisions for the compulsory acquisition of land for the purposes of Part III. of the Act, which are contained in the Third Schedule. Para. 3 of that Schedule is as follows: "An order under this Schedule shall be of no force unless and until it is confirmed by the Minister, and the Minister may confirm the order either without modification or subject to such modifications as he thinks fit, and an order when so confirmed shall, save as otherwise expressly provided by this Schedule, become final and have effect as if enacted in this Act; and the confirmation by the Minister shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act."

In the absence of such an express exclusion of the jurisdiction of the Court, it seems clear to me that the Minister is not entitled to exercise the legislative power of making a confirmation order under s. 40 unless and until both he and the local authority have complied with the procedure which the Act prescribes as preliminary to the making of such an order, which includes the making of a scheme by the local authority, compliance by them with the provisions of ss. 35, 38, and sub-ss. 1 and 2 of s. 40, and compliance by the Minister with the provisions of sub-s. 3 of s. 40 as to a local inquiry, and that the Court is entitled to see that the statutory procedure has been complied with so as to entitle the Minister to make a confirmation order. The question as to what are the minimum essentials of the scheme which the local authorities are directed to make by s. 35 is a matter of statutory construction, which is clearly within the province of the Court.

Where, however, the power delegated to the Minister is a discretionary power, the exercise of that power within the limits of the discretion will not be open to challenge in a Court of law. The power of modification conferred on the Minister in the present case is an example of such a discretionary power.

The expressions of judicial opinion in the case of *Institute of Patent Agents* v. *Lockwood* (1) confirm the above principle. The decision in this House was that the action of declarator and interdict was incompetent, the only remedy being by way of summary prosecution, and, as is pointed out by both Lord Herschell and Lord Watson, the views expressed by them as to the validity of the Board of Trade rules and the right of the Court to review the matter were not essential to the decision of the case. The power delegated to the Board of Trade was to make from time to time " such general rules as are in the opinion of the Board required for giving effect to this section," and the dicta of Lord Herschell and Lord

(1) [1894] A. C. 347.

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Watson as to the exclusion of the jurisdiction of the Court by a clause similar to the present one are restricted to rules made in pursuance of the above power, which left the decision of what was expedient to the sole decision of the Board of Trade. Lord Watson says (at p. 364): "Now, it appears to me that the whole scheme was left to the discretion of the Board of Trade; and it is impossible for me to say that, looking to those regulations, the Board of Trade have in any measure exceeded that discretion. It was by their opinion, not by any judicial opinion, that the matter was to be determined. The Legislature retained so far a check that it required that the regulations which they framed should be laid upon the table of both Houses; and, of course, these regulations could have been annulled by an unfavourable resolution upon a motion made in either House. But what is to be the effect if no such motion be made or carried, or if a motion hostile to the scheme be made in both Houses and rejected by both? The statute makes no difference between these cases. The views expressed by the learned judges in the Court below, so far as I understand them, would in the latter case make it competent for the Court to inquire at its own hand whether or not the Board had kept within the statute although the Legislature had declined to interfere. But I think that all doubt upon that subject is entirely removed by the terms of s. 101 of the Act of 1883, which for all practical purposes is incorporated with s. 1 of the later Act. 'Any rules made in pursuance of this section,' in applying the earlier statute to the later, must be read as, 'Any rules made in pursuance of s. 1, sub-s. 2, of the Act of 1888'; and assuming that the regulations before us were made by the Board of Trade in pursuance of s. 1, sub-s. 2, of the Act of 1888, then in that case these words apply: 'shall be of the same effect as if they were contained in this Act, and shall be judicially noticed.' My Lords, in regard to those words which I have just read, I do not think I can express my opinion more clearly than by saying that I think they mean exactly what they say. Such rules are to be as effectual as if they were part of the statute itself."

Glasgow Insurance Committee v. *Scottish Insurance Commissioners* (1) was the case of a discretionary power given to the statutory commissioners by the National Insurance Act, 1911, s. 65, to make regulations for the purpose of carrying into effect Part I. of the Act. In that case, as also in *Lockwood's* case (2), the statute provided that the regulations should at once have effect, but should be laid before Parliament, and be liable to be annulled by an unfavourable resolution of either House, and the decision, which followed the opinions in *Lockwood's* case, was also partly based on this retention of Parliamentary control, which is not present in the present case. The Lord President (Lord Strathclyde) after stating that the regulations, when issued, have exactly the same effect as if they had been passed by Parliament, adds, "Obviously that would not be so if the regulations related to any other topic than the health insurance part of the National Insurance Act. If, for example, the regulations related to the unemployment part of the Act, then they would not have statutory force and we should have power at once to set them aside. But if they relate exclusively to the health insurance part of the Act, then they have statutory force, and we have no power to intervene."

The case of *Rex* v. *Electricity Commissioners* (3) does not touch the present point, for it related to the statutory powers and duties of the Commissioners in preparing a scheme at a stage prior to confirmation by the Minister and, in that case, by Parliament also, and there was no provision giving statutory effect to the scheme as prepared by the Commissioners. In the Derby case, *Rex* v. *Minister of Health. Ex parte Davis* (4), the jurisdiction of the Court was not challenged; the local authority had presented to the Minister for confirmation what purported to be a scheme under Part II. of the Housing Act, 1925, and the Minister was prohibited from proceeding to confirm it on the ground that it did not contain the statutory essentials of such a scheme. Some of the learned judges in that case expressed the view that certiorari could not have

(1) 1915 S. C. 504, 510.
(2) [1894] A. C. 347.
(3) [1924] 1 K. B. 171.
(4) [1929] 1 K. B. 619.

issued after confirmation by the Minister, but I agree with the opinion of Slesser L.J. in the present case when he says: "I find it difficult to understand how, if the Minister may be restrained from confirming the order on the ground that he has no power so to confirm, it can be said that certiorari will not lie where a confirmation, admittedly invalid, has been made. Such a proposition can only be supported by saying that the confirmation has made the order unchallengeably a part of an Act of Parliament, and, for the reasons I have indicated, I cannot think that when a confirmation is a nullity it can be protected in this way."

I am therefore of opinion that the Court has jurisdiction in the present case to consider and decide whether the statutory formalities have been complied with and whether the scheme contains the minimum statutory essentials. On these questions I have had the advantage of considering the opinion delivered by my noble and learned friend Lord Tomlin and I concur in its reasoning and conclusions.

LORD RUSSELL OF KILLOWEN. My Lords, the appellant's contentions have varied in each Court. Before the Divisional Court his points were two only. He admitted that the scheme which the local authority sent to the Minister for confirmation was not a scheme within the meaning of the Housing Act, 1925; but he contended: (1.) that by virtue of sub-s. 5 of s. 40, the Minister's order operated as a statutory enactment, into the validity of which no Court could inquire; and (2.) that Mr. Yaffe had so acted that the Court ought not to grant him the discretionary relief which he sought.

In the Court of Appeal the admission was withdrawn, and it was contended (in addition to the two points above mentioned) that a proper scheme had been prepared by the local authority and sent to the Minister.

In your Lordships' House the point dependent upon Mr. Yaffe's conduct was dropped, leaving the other two contentions as the foundation of this appeal.

As I understand the matter, if the case had been presented here as it was presented to the Divisional Court (i.e., upon the footing of the admission which was afterwards withdrawn) your Lordships would have supported the quashing of the Minister's order, and would have dismissed the appeal; and this upon the ground that since no scheme was ever submitted to the Minister, he had no power to make any confirmation order, and that consequently no order was ever made upon which sub-s. 5 could operate.

This was the view taken by Swift J. and by the Court of Appeal; and, with your Lordships, I agree with it.

Your Lordships, however, are of opinion that there had been submitted to the Minister a document or documents which constituted a scheme within the meaning of the Act, and which the Minister could and did, under s. 40, by his order validly confirm with modifications.

In this opinion I find myself unable to concur.

The validity of an alleged scheme must, I think, be tested by the contents of the document or documents as they existed immediately before the publication of the advertisement which is required by s. 39. If no scheme such as the Act requires is then in existence, there is no basis for the subsequent procedure; and it would be impossible for the Minister to be satisfied "that the circumstances are such as to justify the making of the scheme," or "that the carrying into effect of the scheme" would be beneficial. Nor could he, in my opinion, under the power to confirm the scheme with conditions or modifications, himself make a scheme by turning into a valid scheme something which up to that time was no scheme at all.

The Act under consideration enables a local authority to take away property compulsorily, and in many cases to pay for it less than full compensation. It is, therefore, essential that all the provisions leading up to the exercise of such a power should be strictly observed according to the language of the statute. Non-compliance with any such provision would, in my view, be fatal to the Minister's power to make a confirmation order.

The scheme which the local authority is required by the Act to make must (by virtue of s. 35) be "a scheme for the rearrangement and reconstruction of the streets and houses within the area or of some of such streets or houses." By this I understand something more than a mere statement of intention to rearrange and reconstruct all or some of the streets and houses. Sect. 38 shows this; for it requires that the scheme shall be accompanied by maps, particulars and estimates. In my opinion the scheme must involve "the rearrangement and reconstruction of the streets and houses within the area or of some of such streets or houses"; and the scheme should disclose the sites within the area which it is proposed that the streets and buildings, when rearranged and reconstructed, shall occupy. Unless what may conveniently be termed the proposed lay out is disclosed, it is difficult to see how any ratepayer can judge whether the scheme should be opposed or not, or how any person could tell whether and to what extent he would be affected by the closing of existing streets and the making of new ones.

The scheme in the present case, as it was sealed by the Liverpool Corporation, is a document which is contained in the exhibit AY^2, and is called in clause 1 thereof the Liverpool (Queen Anne Street) Improvement Scheme, 1928. It incorporates one plan only—namely, the exhibit LHK^2, which merely shows the area (but not the streets) coloured pink and blue. The scheme itself defines the area; but there is nothing in the sealed document to indicate whether any rearrangement of streets is intended to be made or not, or whether all or how many of the existing buildings are to be pulled down. By treating as part of the scheme made by the Liverpool Corporation a document which is not under their seal and is headed "Particulars and statements," it is possible to ascertain that the Corporation intended to remove all the existing buildings. That appears from para. IV., but that same paragraph reveals the intention on the part of the local authority, after removing the buildings, "to appropriate the land for the erection of suitable dwellings or for any other purpose that they may think desirable, or to dispose of the site by a sale in fee simple, or by building leases as they may deem to be most advantageous."

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Once this paragraph is introduced, all certainty that any houses will be erected on the cleared site disappears. The estimate of cost which appears in the sealed document does not help matters. The incurring of the cost remains, in the face of the documents, a matter of uncertainty.

My Lords, I am unable to accede to the view that the report made by the acting director of housing and the plans therein referred to form part of the scheme which the Liverpool Corporation made. In my opinion the two documents which I have mentioned, with the plan LHK^2, alone constitute the "scheme" which the local authority made. They alone constitute the "scheme" in regard to which the local authority presented a petition under s. 40, praying that an order might be made confirming the same. They alone constitute the "scheme" in relation to which a local inquiry was held.

In my opinion it is impossible to say that documents which contain no indication of any proposed lay out and which disclose no unequivocal intention to rearrange any streets or to rebuild any houses, constitute, in any sense, "a scheme for the rearrangement and reconstruction of the streets and houses within the area or of some of such streets or houses."

I am aware how difficult it may be to define the amount of detail which a scheme made by a local authority under the Act should contain. It is sufficient in this case to say that, wherever the line is to be drawn, the documents here in question fall well on the wrong side of it.

If I am right in this, then there never was any "scheme" made or prepared by the local authority; there was nothing as to which the Minister could be satisfied that the circumstances were such as to justify the making thereof; there was nothing for him to confirm.

My Lords, I have expressed in my own way the reasons why I think the alleged "scheme" was not a scheme within the Act. They are, I think, substantially the same as those which influenced the Lords Justices. With their opinions I concur and I would dismiss this appeal.

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Order of the Court of Appeal reversed and judgment of the King's Bench Division restored. The respondent Abraham Yaffe to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, March 23, 1931.

Solicitor for the appellant: *The Solicitor, Ministry of Health.*

Solicitors for the respondent: *Few & Co., for W. J. Shield, Liverpool.*

[HOUSE OF LORDS.]

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May 11.

FORTH CONSERVANCY BOARD . . . APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE . . . . RESPONDENTS.

Revenue—Income Tax—River Conservancy Board—Dues levied under Statute on Shipping entering a River—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case VI.*

A conservancy board was established by statute to preserve and improve a river and firth and to control the navigation therein. Its members were appointed or elected by local authorities, Government departments, railway companies and shipowners. It possessed wide powers to dredge, light, buoy and otherwise improve the navigation of the river, and it was empowered to levy dues on vessels entering the river or firth. These dues constituted its sole revenue, and were directed by statute to be applied to the purposes of the undertaking as the Board might determine:—

Held, that the board was assessable to income tax on the surplus revenue arising from these dues under Case VI. of Sch. D of the Income Tax Act, 1918.

Mersey Docks and Harbour Board v. *Lucas* (1883) 8 App. Cas. 891 applied.

Severn Fishery Board v. *O'May* [1919] 2 K. B. 484 distinguished.

Decision of the First Division of the Court of Session in Scotland 1930 S. C. 850 affirmed.

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

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APPEAL from an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland (1) reversing a determination of the Commissioners for the General Purposes of the Income Tax Acts for the District of Stirling.

The appellant Board was constituted by the Forth Conservancy Order Confirmation Act, 1921, for the purpose of regulating and improving the navigation of the upper portion of the Firth of Forth, and under that Act the appellants were authorized to levy shipping dues from the owners of ships using the River Forth. These dues had been levied and collected since 1921, and constituted the sole revenues of the Board. In a former case between the same parties the question was raised whether the appellants were legally assessable to income tax in respect of these revenues under Sch. A, No. III., r. 3, of the Income Tax Act, 1918, and it was ultimately decided by the House of Lords (2) that they were not.

The question raised by the present appeal was whether the appellants had been rightly assessed to income tax under Case VI. of Sch. D in respect of the same balance of shipping dues collected by them during the five years ended April 5, 1926.

The General Commissioners answered this question in the negative, but their determination was reversed by the First Division (the Lord President, Lord Sands, Lord Blackburn and Lord Morison).

The facts are stated in the opinion of Lord Buckmaster and are summarized in the headnote. The case is set out in full in the report in the Session Cases.

1931. March 16, 17. *Latter K.C.* (of the English Bar) and *T. M. Cooper K.C.* (of the Scottish Bar) (with them *George A. Montgomery* (of the Scottish Bar)) for the appellants.

1. A surplus of a public administrative body which is merely discharging public duties is not a taxable profit within the Income Tax Act, 1918. The operations of the appellant

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(1) 1930 S. C. 850.

(2) [1929] A. C. 213.

Board are confined to the maintenance, improvement, and regulation of a public navigable river. They have no proprietary rights in the river, and their sole revenue is derived from the dues which they are authorized by Parliament to exact from vessels navigating the channel under their control. If these receipts are in the nature of a tax they are not profits. The test of whether these receipts are liable to income tax is whether they are of the same description as the various kinds of profits referred to in the Income Tax Act, 1918. *Severn Fishery Board* v. *O'May* (1) is a decision directly in the appellants' favour, and is not inconsistent with *Mersey Docks and Harbour Board* v. *Lucas* (2) or with *Humber Conservancy Board* v. *Bater* (3), in each of which cases the undertakers enjoyed large proprietary rights. This is not a profit-making concern but a Board carrying out public duties apart from any idea of profit. In *Attorney-General* v. *Black* (4) Blackburn J., whose language was approved by Viscount Dunedin in *Jones* v. *Leeming* (5), says, referring to Sch. D: "A corporation . . . . would not be liable except in respect of something of the same nature and kind as what had been previously mentioned; not, for instance, in respect of a borough rate, a poor rate, or a highway rate, because these are not within the analogy of 'the property or profit' previously described." In the appellants' submission the considerations which exclude the liability of a road authority to taxation on the balances in their hands should logically be extended to such an undertaking as that of the appellants. In the same case Montague Smith J., while admitting that the purpose to which the rate is applied cannot be taken into consideration, if in its nature it is a property or profit, says that it may be looked at as one of the circumstances which determine whether it is more in the nature of a tax or of a toll. No doubt, in the *Mersey Docks* case (6) it was laid down by Lord Selborne and Lord Blackburn that the mode in which the profits are applied does not affect the question

(1) [1919] 2 K. B. 484, 490.

(2) 8 App. Cas. 891.

(3) [1914] 3 K. B. 449.

(4) (1871) L. R. 6 Ex. 308, 309, 311.

(5) [1930] A. C. 415, 422.

(6) 8 App. Cas. 891, 907, 910.

whether they are liable to taxation, but the appellants are not relying upon the mode of application of the surplus, but upon the character of the receipts: see *Glasgow Water Commissioners* v. *Inland Revenue.* (1)

2. A surplus of an undertaking such as this cannot fall within Case VI.; it is either a profit in the way of trade or nothing, and, as the respondents have throughout proceeded on Case VI., they ought not now to be allowed to change their ground, and no remit should now be made to the General Commissioners: *Pearn* v. *Miller* (2); *Foulsham* v. *Pickles.* (3)

Craigie Aitchison L.A. and *Reginald Hills* (of the English Bar) (*Sir William Jowitt A.-G.* and *A. N. Skelton* (of the Scottish Bar) with them) for the respondents. Prima facie, profits under the Income Tax Act, 1918, include everything which is not specially exempted by the Act. The appellants cannot escape by saying that they are a public utility concern: see *Drummond* v. *Collins.* (4) These dues are not analogous to a district rate. The authorities draw a distinction between a rate levied for the benefit of the particular locality and a due levied on anybody who happens to bring his ship into the area. Per Lord Fitzgerald in *Mersey Docks and Harbour Board* v. *Lucas.* (5)

[LORD THANKERTON referred to *Glasgow Water Commissioners* v. *Miller.* (6)]

In the *Mersey* case the surplus revenue of the Harbour Board was treated as a profit or gain, and the whole basis of that decision was that the mode of its application made no difference in determining whether it was a taxable profit. *Attorney-General* v. *Black* (7) is also in point. There the income derived from a grant to the Brighton Corporation of a duty on every chaldron of coal landed on the beach for the purpose of erecting and maintaining groynes against the sea was held chargeable to tax, and the argument that it was analogous to a district rate was rejected. These surplus revenues have been rightly charged under Case VI. as being annual profits or gains not falling under any of the previous Cases, but if they are more appropriately dealt with under Case I. the case can be remitted to the General Commissioners for adjustment, but the liability to tax should be maintained.

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(1) (1875) 2 R. 708.

(2) (1927) 11 Tax Cas. 610.

(3) [1925] A. C. 458, 465.

(4) [1915] A. C. 1011, 1017.

(5) 8 App. Cas. 891, 913.

(6) (1886) 13 R. 489.

(7) L. R. 6 Ex. 78; 308.

Latter K.C. in reply referred to *Mersey Docks and Harbour Board* v. *Cameron* (1) and *New York Life Insurance Co.* v. *Styles*. (2)

The House took time for consideration.

1931. May 11. LORD BUCKMASTER (read by LORD MACMILLAN). The Forth Conservancy Board are the appellants in this appeal, brought from an interlocutor of the First Division of the Court of Session, whereby it was decreed, in opposition to the decision of the Commissioners for the General Purposes of Income Tax, that the appellants had been properly assessed under the Income Tax Act of 1918, Sch. D, Case VI., for the years 1921 to 1926 inclusive.

The figures of the assessments are immaterial for the present purpose.

The income in question arises from shipping dues, which the appellants are entitled to charge upon ships using the River Forth in the following circumstances.

By statute known as the Forth Conservancy Order Confirmation Act, 1921, confirming an order of the Secretary for Scotland, the appellant Board was constituted for the purpose of the preservation, maintenance, and improvement of the River and Firth of Forth. By this it was declared that the Board should consist of thirty-one members, nine of whom should be elected by shipowners and persons paying dues to the Board. The circumstances which led to the passing of this Act and a full examination of the powers that it conferred are to be found in the former *Forth Conservancy* case. (3) For the purposes of this appeal it is sufficient to say that the

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(1) (1865) 11 H. L. C. 443, 505. (2) (1889) 14 App. Cas. 381.
(3) [1929] A. C. 213.

Board were empowered to do everything necessary for the purpose of maintaining the river as a navigable river, and to levy dues as specified in the Third Schedule in respect of vessels entering or using that part of the river within the Board's jurisdiction and in respect of goods and passengers conveyed upon or shipped or unshipped in the river.

These dues had been fixed by the Board in respect of the goods at ½*d.* a ton, and it is the balance of such moneys, after providing for all expenses, which is the subject of the present assessment.

Such balance is subject to the express provision that it shall be applicable to such purposes and in such manner for the purpose of the undertaking as the Board may determine.

The Commissioners of Inland Revenue charge the matter as alternatively arising under Case I. or Case VI., Sch. D 2. The interlocutor appealed from declared that the assessment was properly made under Case VI.

The two Cases, as is well known, respectively provide that tax under the Schedule should be charged as to Case I. in respect of any trade not contained in any other Schedule, and under Case VI. in respect of any annual profits or gains not coming under any of the foregoing Cases and not charged by virtue of any other Schedule, and the rule applicable provides that the trade under Case I. should be a trade, manufacture, adventure, or concern in the nature of trade.

In my opinion the judges of the First Division were right in holding that the assessment could not be supported under Case I. To manage the navigation of a river, and to charge dues for the ships, is not a trade, nor a concern in the nature of a trade. For trade involves something in the nature of a commercial undertaking, of which buying and selling are the most obvious characteristics.

At the same time, I am clearly of opinion that the moneys received are annual profits or gains, and in the case of the *Mersey Docks* v. *Lucas* (1) it was clearly decided that the purpose to which annual profits or gains are applied could not affect the liability to tax. It is quite true that in that case the assessment was made under Sch. A, and the Mersey Docks Authority in fact owned a large quantity of real estate in the nature of docks and quays, but this fact did not affect the principle of the decision, and indeed Lord Blackburn pointed out that it really did not matter in that case under which head the assessment fell. The fact that the appellants could not be held to hold property similar to that in the *Mersey Docks* case enabled them in the former case to escape the assessment, which for some reason was expressly limited to that head, but it left unaffected the question as to liability under Sch. D. Apart even from the statement of Lord Blackburn, to which I have referred, the principle of the *Mersey Docks* case appears to me completely to cover the present, but it is argued that it was not an express decision upon the point, and that by analogy to the principle that exempts public rating authorities, the appellants ought also to be exempted here.

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(1) 8 App. Cas. 891.

The principle of exemption for the surplus of rates is, I think, to be found in this, that the rating authority collects money from the inhabitants of the district for the purpose of application to the expenses incurred on behalf of the inhabitants, and that any surplus rightly belongs to the inhabitants themselves, who receive its benefits in case of any surplus, because it is carried forward towards the expenses of the ensuing year. It was contended by the appellants that the shipping community as a whole occupied a similar position to that of the ratepayers, but I find the analogy too far drawn to be acceptable. The people who have paid the dues may or may not use the river again, and those who have never contributed to them may get the benefit of the expenditure. A class of persons, connected only by the fact that they own shipping, cannot possess the same characteristics as a body of people like ratepayers, each one of whom receives in some form direct benefit from the money he has provided.

Different considerations arise where the local authority does carry on an undertaking like a tramway or even a waterworks and the *Glasgow Water Works* case (1), shows that, at any rate where the area of their activities extends beyond the rateable area, the liability to tax at once arises in respect of profits, and this has been accepted in numerous cases. If a local authority carries on an industrial undertaking it stands in the same position for income tax as a company or an individual. The earlier decision on the same waterworks (1) held them exempt where the water was only supplied to their own ratepayers. It is unnecessary for the purpose of this decision to examine the soundness of that case, but it was determined before the case of the *Mersey Docks* v. *Lucas* (2), and the two cases appear difficult of reconciliation.

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(1) 13 R. 489.

The nearest case to the present is that of the *Severn Fishery Board* v. *O'May.* (3) There, power had been given to conserve a river, to make by-laws and fine people for the breach, as well as to issue licences for fishing. It might be urged that the annual profits and gains arising from the fines correspond to the moneys arising from fines in the courts of summary jurisdiction, and that the levying of fines does not constitute annual profit or gain. It is at least a distinction from the present case, and I do not think, in order to support the interlocutor appealed from, that it is necessary that it should be declared overruled.

I therefore express no opinion as to its validity. I think the interlocutor appealed from was correct and that this appeal should be dismissed.

VISCOUNT DUNEDIN. My Lords, it is with the greatest reluctance that I find myself compelled to concur with your Lordship in the judgment proposed: I say this, not only because were it not for authority I should wish to decide the case otherwise, but still more because I think that the effect of the judgment will be disastrous to the proper efficiency of the statutory body concerned, and will, to a great extent, defeat the object for which the Act of Parliament under which they exist was passed. What was the object of the Act? It was to improve the navigation of the Forth and encourage trade, by way of shipping, in that river. In

(1) 2 R. 708.
(2) 8 App. Cas. 891.
(3) [1919] 2 K. B. 484.

order to effect that object the statutory body is brought into existence to dredge the river and, from time to time, to improve the navigation by means of cuts in the channel, by deepening the water, and by abrasion of the banks.

In order to do these things the body are entitled to levy dues upon vessels using the river. Not a penny of the dues so levied can be employed for any other purposes except only for the necessary expenses of the trust. No one makes a personal profit out of any of the moneys received. But, after this judgment, more than one-fifth of the money which may, at the end of the year, have stood at their credit is to be paid over as income tax. The only result will be that the trustees will take care to have as small a surplus as possible, and any saving of money in order to execute any larger work, which would have excellent results, will obviously be discouraged. Such a result is, I think, utterly foreign to the proper idea of an income tax, which is meant to be a levy on what the person who pays would otherwise use for his own purposes, whether of business or enjoyment, and, in my view, a public body of this sort ought not to be subjected to any such tax.

Of course, I do not go the length of saying that in some cases income tax ought not to be levied on a public body. If, for example, landed property is held by such a body, I do not think that that fact would justify what would be the removing from the natural incidence of the tax a subject which, held by any one else, could give rise to no question.

But there is nothing of that sort here. The only property of the Board is the money raised by dues, and the dues are totally expended on the objects for which the Board is by Act of Parliament created.

Now, as to what ought to be the decision, I can myself see no true distinction between this case and the case of any public body raising rates for public service. Yet, it is common ground that such rates are not liable to income tax. It has been sought to distinguish those cases from this —and I think it is done in one of the judgments which are about to be delivered, and which I have had the advantage

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of reading—by saying that, in those cases, it is the ratepayers' own money, which has already paid income tax. The same thing might fairly be said in this present case, if you view the shipowners who use the river as a body, just as you view the taxpayers as a body. It may be said that a foreign ship might use the Forth, and that that owner has not paid income tax. Equally, it may be said that if any hereditament in a town belonged to a foreigner who was not personally present in the country for more than six months, his contribution to the rates would be from money on which he had not paid income tax.

I would, had I been free, have decided this case upon the ground that the surplus dues which might be found to exist at the end of any year were not, in the sense of the Income Tax Acts, a profit or gain. It is trite law that all gains are not gains in the sense of the Income Tax Acts, and I would hold that these moneys were not of that sort.

But I am bound by authority, and I cannot resist the authority of the *Mersey Docks* case. (1) The case itself was different, because the dockowners in that case held actual real property. But it was most definitely laid down in this House that the purpose to which the money collected was applied could not be considered in settling whether it was a gain or profit, or not. I regret what was laid down in that decision. I think it would have been better to have followed what had been said before—namely, that though, once it was settled that a sum was a profit or gain, the question of how it was employed did not matter, yet it was permissible to look at how it was to be expended in order to judge of the question whether it was a true profit or gain.

There is, I think, no question that the same line of reasoning which appeals to me appealed to Lord President Inglis in the first *Glasgow* case. (2) It is possible to doubt the soundness of that decision in the light of the *Mersey Docks* case, which was subsequent and of higher authority.

I think the decision can be saved by considering the supply of water, not in the light of supplying a commodity, but of rendering a public service, just as lighting or cleaning are public services, and this view is helped by the fact that you could not escape the water rate by offering to prove you had used no water. That Lord President Inglis had to consider whether the judgment would stand after the Mersey case (1) is, I think, shown by the ground on which the second Glasgow case (2) was distinguished from the first, and indeed in that case he distinctly said that he had reconsidered his first judgment and still remained of the same opinion.

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(1) 8 App. Cas. 891.

(2) 2 R. 708.

But whether I am right as to this or not, the fact remains, as I have stated, as to what was laid down in the Mersey case, and, if I may not look at the ultimate destination of the moneys as affecting the question of whether they are properly profit or gains in the sense of the income tax or not, there is no more to be said.

I, therefore, cannot dissent from the motion made.

Lord Warrington of Clyffe. My Lords, the appellants the Forth Conservancy Board are a statutory body incorporated by a Provisional Order confirmed by Act of Parliament passed on May 12, 1921.

The objects with which the Board was incorporated were the preservation, maintenance and improvement of the River and Firth of Forth from Stirling to an imaginary line drawn across the Firth approximately one mile east of the Forth Bridge.

The Board is invested with extensive powers for the carrying into effect the objects of its incorporation, and it is authorized to levy dues, rates and charges specified in the Third Schedule to the Order in respect of vessels entering or using that part of the River and Firth of Forth which is within the Board's jurisdiction and in respect of goods and passengers conveyed upon or shipped or unshipped upon the river. The Board is also empowered to recover rates for the use of certain conveniences and in respect of services rendered in connection with the river.

(1) 8 App. Cas. 891.

(2) 13 R. 489.

So far the sole revenues of the Board as to which the present question arises have been derived from shipping dues.

By s. 75 of the Order it is provided that all moneys received by the Board in the nature of revenue are to be applied in payment of expenses, of interest on borrowed money, in providing a sinking fund in respect of borrowed moneys, in establishing a reserve fund not exceeding at any time 20,000*l.*, and the balance if any is to be applicable to such purposes and in such manner for the purpose of the undertaking of the Board as the Board may determine.

The Board having been assessed to income tax under Case VI. of Sch. D for the years 1921–22 to 1925–26 inclusive upon their surplus revenues for those years appealed to the General Commissioners, who allowed the appeal and discharged the assessments. The Commissioners at the request of the Crown stated a case for the opinion of the Court of Session on the question of law whether the surplus revenues of the Board are profits and gains within the meaning of the Income Tax Act, 1918, Case VI. of Sch. D, and assessable to income tax under that Case.

The First Division of the Court of Session by their interlocutor dated June 27, 1930, answered the question of law in the affirmative and reversed the decision of the Commissioners. Hence this appeal.

The respondents contended before the Commissioners and the Court of Session and again in this House that the appellants are assessable either under Case I. or under Case VI. I agree, however, with the opinions expressed by their Lordships in the Court of Session that the undertaking in question cannot properly be regarded as trade, or as an adventure or concern in the nature of trade (see s. 237).

It is, however, an undertaking which produces surplus revenues in each year remaining as a balance after satisfying the purposes to which under the Order the gross receipts in the nature of revenue are made applicable. I have a difficulty in understanding how on the plain reading of Case VI. this annual balance of revenue can be anything but annual profits or gains within the meaning of Case VI. If this is so then it is settled by the decision of this House in the *Mersey Docks and Harbour Board* v. *Lucas* (1) that the fact that the balance in question is applicable only for the purposes of the Board's undertaking can make no difference.

But it was insisted that the Board in this case is not carrying on an undertaking analogous to those mentioned under other heads in the Schedule, and in particular that of trade, and that it ought to be treated as if it were on the same footing as a local body raising rates for public purposes, and having a surplus of revenue at the end of a financial year. That such a body ought to be regarded as not making a profit or gain within the meaning of the Income Tax Acts has been recognized as good law: see *Attorney-General* v. *Black* (2), and particularly the judgment of Blackburn J. A public body making and administering rates collected from the ratepayers in the locality is not making a profit, but simply collecting in a particular financial year by prudent budgeting more than it actually required, leaving a balance which goes towards reducing the amount required to be collected in the following year.

In the present case the Board is collecting dues and tolls from persons using the river, but those persons are in no sense their constituents, as are the ratepayers in the case of a local body. The profits here are those of the Board itself arising from an undertaking analogous to a trade and, as I have already pointed out, the fact that the application of those profits is regulated and limited by the Order cannot on the authorities prevent those profits from being taxable.

As to the decision of Rowlatt J. in the *Severn Fishery Board* v. *O'May* (3), I have read and considered carefully the judgment of the learned judge. The ground of his decision was that the surplus there in question was not the result of activities analogous to trade and was for that reason not liable to tax. On that footing, assuming it to be correct, the case is on its facts distinguishable from the present.

The case of the *Glasgow Water Commissioners* v. *Inland Revenue* (4) was decided in the Court of Session before the

(1) 8 App. Cas. 891.
(2) L. R. 6 Ex. 308, 309.
(3) [1919] 2 K. B. 484.
(4) 2 R. 708.

decision in this House of the *Mersey Docks and Harbour Board* v. *Lucas* (1), and the question whether, in view of that decision, it can now be treated as an authority must I think be left open. At any rate it is not binding on this House, and is I think on its facts distinguishable from the present case.

The result is that in my opinion the appeal fails, and ought to be dismissed with costs.

LORD THANKERTON. My Lords, the facts in the case and the statutory provisions have already been sufficiently stated by your Lordships, and I agree with the conclusion at which your Lordships have arrived.

During the years here in question the appellants were undoubtedly carrying on a statutory undertaking and derived revenues from shipping dues in excess of their expenditure in each year. They have been assessed to income tax in respect of the surplus revenue so arising in each year under Case VI. of Sch. D of the Income Tax Act, 1918, and in the present appeal they challenge these assessments on two grounds—namely, (1.) that these surplus revenues are not "profits or gains" within the meaning of the statute, and (2.) that, in any event, they fall within Case I. of Sch. D, and not Case VI. I will deal with these contentions in their order.

The appellants maintained that the surplus revenues of a body administering public duties under the authority and directions of an Act of Parliament were not in the nature of profits or gains. This appeared to rest on two separate grounds; first, that they were bound by the provisions of their statute to apply these annual surplus revenues for the purposes of the undertaking, and, secondly, that the dues charged by them were ejusdem generis with such things as local rates, which have invariably been regarded as not being profits or gains.

The first of these grounds is clearly not open to the appellants in view of the decision of this House in *Mersey Docks* v. *Lucas*. (2) Lord Selborne L.C. says: "If it could

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(1) 8 App. Cas. 891.

(2) 8 App. Cas. 891, 905.

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be reasonably contended that the word ' profits ' in these Acts has reference to some advantage which the persons carrying on the concern are to derive from it, it might be said perhaps that the same argument might have been raised upon the word ' gains ' ; but to my mind it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purposes it is used, whether it is gained for the benefit of a community, or for the benefit of individuals. Whether the benefit is to be obtained by dividends, or whether it is to be obtained by lightening and diminishing public burdens, it is the same."

The attempt to assimilate the imposition of these dues to the imposition of local rates equally fails, in my opinion. The appellants founded on the decision of the First Division of the Court of Session in *Glasgow Water Commissioners* v. *Inland Revenue* (1) and a decision of Rowlatt J. in *Severn Fishery Board* v. *O'May.* (2) It is important to ascertain the reason for the exemption of local rates from income tax. In my opinion it is because the ratepayers are really levying the rate on themselves through their representative body, and, as complete accuracy is impossible in budgeting for the future, there is almost bound to be either a surplus or a deficiency, but such surplus is still the money of the ratepayers and cannot be described as a profit or gain. In the present case, the Lord President's analogy of the surplus of the householder's allowance to his housekeeper in any year over the latter's expenditure in running the household in that year appears to me most apt. The distinction is well expressed by Lord President Inglis in the case of the *Glasgow Water Commissioners*, when he says (3) : "The case is entirely different from those that have been cited which have been decided in the Court of Exchequer in England, because in those cases the statute which gave the right to levy the assessment did not impose it upon the citizens of the particular burgh or locality which obtained the Act. It was not an authority to the citizens of a particular locality to assess themselves. On the contrary, it was a right or privilege given

(1) 2 R. 708. (2) [1919] 2 K. B. 484. (3) 2 R. 713.

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to a particular corporation to assess everybody—the whole public who happened to import, in the one case, coals into the burgh, and, in the other case, to import something else—I forget what it was." As appears from the opinion of the Lord President, the case was decided on the footing that the cost of the water supply was met by two compulsory rates, the public and domestic water rates, levied within the area of the city, and payable by the ratepayer whether he used the water or not, any surplus being carried forward in reduction of future rates. No attempt was made in that case to distinguish between the rates raised within the limits of compulsory supply and the revenue which was raised outside these limits, and the Lord President expressly reserved any question as to the assessability of the latter; this question was subsequently raised in *Glasgow Water Commissioners* v. *Miller* (1), in which Lord President Inglis again delivered the judgment of the Court and in which the case of the *Mersey Docks* v. *Lucas* (2) was before the Court. It was held that the Commissioners were assessable to income tax under Sch. D in so far as surplus revenue arose from either non-compulsory rates outside the compulsory limits of supply, or supplies of water by measure or in terms of special agreements for manufacturing or other trading purposes. Referring to the earlier case, Lord President Inglis said: "We were all of opinion that within the limits of compulsory supply the concern or undertaking, as defined by the local Act, was of this nature, that the citizens of Glasgow undertook to assess themselves for accomplishing the important public purpose of supplying the city (being the limits of compulsory supply) with a good supply of pure water; that in doing so they had and could have no view of making profit, for that would have been equivalent to paying out of one pocket and into another pocket of the same individual or class; that they paid these assessments for no other purpose than that of obtaining the particular contemplated benefit, and when that benefit is fully attained and secured for the future the assessment and the authority to levy it come to an end.

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(1) 13 R. 489, 492.

(2) 8 App. Cas. 891.

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I have reconsidered that judgment, and have not seen any reason to doubt its soundness." He added later that the principle and rule of construction laid down in his judgment were confirmed by the more recent case of the *Mersey Docks.* In my opinion, these statements of Lord President Inglis precisely define the reasons why local rates are not profits or gains for purposes of income tax, and they clearly show that the dues charged by the appellants are not ejusdem generis with local rates, for they are levied by a particular corporation on all and sundry the vessels that take advantage of the navigation in their statutory area. The payers of dues have only a very limited representation on the appellant Board, and in no sense can this be called an undertaking in which the payers of dues undertake to levy the dues on themselves.

In *Attorney-General* v. *Black* (1) Brighton Corporation were held liable to pay income tax in respect of dues which, under local Acts, they levied on all coal landed on the beach or brought into the town. Keating J. says: "Mr. Manisty does not contend that harbour and port dues, and other revenues of that description, are not taxable; and the Attorney-General admits that a district rate is not. The question then is, does the rate in question partake more of the nature of the one or the other? I am of opinion that it does not partake of the character of a district rate imposed by the inhabitants of a place upon themselves; and that on the other hand, it is very difficult to distinguish it from harbour dues." In *Mersey Docks* v. *Lucas* (2) Lord Fitzgerald says: "There is nothing to be found in this income in the nature of a district or local rate or of a rate or tax which could be considered as a payment by which the inhabitants of the locality procure for themselves some local benefit. The dues are in effect levied on the whole world coming to the Mersey or to Liverpool, and on those taking advantage of the docks or other property of the appellants."

There remains the case of the *Severn Fishery Board* (3),

(1) L. R. 6 Ex. 308, 311.
(2) 8 App. Cas. 891, 913.
(3) [1919] 2 K. B. 484, 490.

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the facts in which appear to be very similar to the present case. The Board in that case was a statutory one, invested with the power and duty of protecting the salmon fishings in the river and to do such acts as they might deem expedient for the protection and improvement of these fishings. Their receipts were derived from fishing licences and fines for offences against the Salmon and Freshwater Fisheries Acts. Rowlatt J. says: "Now what is the position of this board? The receipt of money by them has nothing to do with any sort of property, or any sort of undertaking in connection with which the subject of profit could be thought of. They have no property. They have no tolls nor any of the other things mentioned in the Act; they have no trade or concern in the nature of trade. They are simply acting as a public body protecting the fisheries for a particular locality, in the same way that the Government might protect them, and raising for that purpose a revenue by taking licences from the people who enjoy those fisheries. It is not like a profit-making concern at all. The revenue authorities have treated them as carrying on something analogous to a trade, and as making a profit out of the balance of the receipts over and above the expenses of upkeep. I do not think that is the right view at all. I think they make no profit. As in my view the resulting balance is not a profit it becomes unnecessary to consider whether the fact that they expended the balance under the statutes in making improvements to the rivers and fish passes relieves them from liability to taxation." In my opinion, that statement is inconsistent with the decision in the *Mersey Docks* case (1) in so far as (*a*) it implies that revenues raised by a public body intrusted with the discharge of a public duty cannot be profits or gains for the purposes of income tax, and (*b*) it assumes that the purpose to which the revenues are applied can procure relief from taxation, which would otherwise be due. But, further, I am unable to agree that the Severn Board were not carrying on an undertaking or concern, and I am unable to find any facts in the case which would place the Board's sources of revenue in the same category as local rates; I therefore cannot regard the learned judge's conclusions as sound.

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(1) 8 App. Cas. 891, 913.

Accordingly, I am of opinion that the surplus revenues of the appellants are annual profits or gains within the meaning of the Income Tax Acts. I am further of opinion that these surplus revenues were rightly assessed under Case VI. of Sch. D, and not under Case I. In my opinion, the appellants do not carry on a trade, which is defined by s. 237 to include every trade, manufacture, adventure or concern in the nature of trade, but they do carry on an undertaking or concern which is analogous to a trade. It is one of those somewhat unusual cases such as that of *Cooper* v. *Stubbs*. (1)

I therefore agree that the decision of the Court of Session should be affirmed and the appeal dismissed.

LORD RUSSELL OF KILLOWEN (read by LORD MACMILLAN). My Lords, the question for decision in this case is whether the appellants were rightfully assessed to income tax under Sch. D of the Income Tax Act, 1918, in respect of each of the five years ending with April 5, 1926.

In each of those years there has been a surplus of revenue income of the appellants over revenue expenditure by the appellants; and it is in respect of such surplus that the assessments were made. The General Commissioners, having discharged the assessments, stated a case pursuant to s. 149 of the Act, for the opinion of the Court of Session as the Court of Exchequer in Scotland, upon the question of law—"whether the surplus revenues of the Appellant Board are profits or gains within the meaning of the Income Tax Act, 1918, Case VI. of Sch. D, and assessable to income tax under that Case."

The judges of the First Division answered the question in the affirmative, and with that answer I agree.

There is no necessity for me to recapitulate the other facts in the case, or to refer to the provisions of the Forth Conservancy Order, 1920. They have already been sufficiently stated.

From them it is established that the Forth Conservancy Board during the period in question were habitually engaged

(1) [1925] 2 K. B. 753.

in activities which resulted annually in an excess of revenue receipts over revenue expenditure. Such excess falls within the plain wording of cl. 1 (*b*) of Sch. D, as " annual profits or gains not charged under Schedule A, B, C, or E, and not specially exempted from tax." It is therefore prima facie chargeable to tax under Sch. D, and the particular Case under which it is chargeable must necessarily be Case VI.; for while the activities of the appellants cannot, I think, be properly described as a trade or in the nature of a trade, they are such that the appellants can properly be said to carry on an undertaking analogous to a trade.

The reasons urged before your Lordships by the appellants as justifying the view that this surplus was not chargeable to tax, were two in number.

First it was said that the surplus revenue of a body such as this, which was bound to apply such surplus for the purpose of its undertaking, could not be profits or gains within the meaning of the Income Tax Acts. This point appears to me to have been concluded against the appellants by the decision of your Lordships' House in the *Mersey Docks* case. (1)

Secondly it was contended that the surplus revenues of this body were on the same footing as local rates, which have never been treated as profits or gains assessable to tax. In relation to this argument I desire to add nothing to the remarks which my noble and learned friend Lord Thankerton, has addressed to your Lordships upon this point. They exactly express my own views.

I agree that this appeal fails and should be dismissed.

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, May 11, 1931.

Agents for the appellants: *Grahames, Chapple & Co., for James Learmonth, Stirling, and Laing & Motherwell, W.S., Edinburgh.*

Agent for the respondents: *Solicitor for England of Board of Revenue, for Solicitor for Scotland of Board of Revenue.*

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(1) 8 App. Cas. 891.

[HOUSE OF LORDS.]

H. L. (Sc.)* ARNEIL AND OTHERS . . . . APPELLANTS;

1931

AND

May 14. PATERSON AND ANOTHER . . . . . RESPONDENTS.

Dog—Sheep worrying—Attack by Two Dogs acting in Concert—Different Ownership—Action of Damages—Liability of Owners in Solidum—Dogs Act, 1906 (6 *Edw.* 7, *c.* 32), *s.* 1, *sub-s.* 1.

By the Dogs Act, 1906, s. 1, sub-s. 1: "The owner of a dog shall be liable in damages for injury done to any cattle by that dog; and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such previous propensity, or to show that the injury was attributable to neglect on the part of the owner."

Two dogs, the property of different owners, acting in concert, attacked a flock of sheep and injured several. An action of damages brought under this Act by the owners of the sheep against the respective owners of the dogs, craving for a joint and several decree against the defenders, was defended by one defender only, who claimed that he was liable for one-half only of the damage:—

Held that, when once liability under the Act was established, the ordinary measure of damages had to be applied; that in law each of the dogs occasioned the whole of the damage as the result of the two dogs acting together, and that consequently each owner was responsible for the whole.

Piper v. *Winnifrith* (1917) 34 Times L. R. 108 commented on.

Decision of the First Division of the Court of Session in Scotland reversed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland recalling an interlocutor of the Sheriff-Substitute of Stirling, Dumbarton and Clackmannan.

The question raised by this appeal arose out of the worrying of sheep belonging to the appellants by two dogs of which the two respondents were respectively the owners. As a result of the worrying several of the appellants' sheep were killed whilst others were seriously injured. The appellants brought an action of damages against the respondents as owners of the dogs, claiming a joint and several decree against them. The respondent Paterson alone defended the action.

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* *Present:* VISCOUNT HAILSHAM, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, and LORD THANKERTON.

By his defence he admitted that the appellants' sheep were worried by the two dogs acting together, but he claimed that he was liable for one half only of the damage. The respondent, Mrs. White, did not appear and took no part in the action.

The Sheriff-Substitute granted a joint and several decree against the respondents.

The First Division (the Lord President, Lord Blackburn and Lord Morison) recalled the decree of the Sheriff-Substitute and found the respondent Paterson liable for one half of the damage.

Condie Sandeman D. F. (with him *James A. R. MacKinnon* (of the Scottish Bar)) for the appellants.

Where, under the Dogs Act, 1906, the damage to the sheep is done by two dogs acting in concert, and it is not shown that any specific part of the damage was done by one of the dogs only, on general principles of law each dog must be treated as having occasioned the whole damage and each owner is responsible for the whole. Stair, 1, 9, 6; Pollock on Torts (13th ed.), p. 202, *Fleming* v. *Gemmill.* (1) Under the common law of Scotland, differing in this respect from the law of England, it was held that where a dog had destroyed a number of sheep, it was no answer to the claim that the dog had never previously shown any mischievous propensity: *Fleeming* v. *Orr.* (2)

James Stevenson (of the Scottish Bar) for the respondent Paterson.

This case must depend on the statutory liability. The liability arises out of ownership and ownership only. Delict is not the foundation of the liability. The statute says that the owner of a dog is to be liable for the injury done by that dog. There is no principle of law which makes the owner of a dog liable jointly and severally along with the owner of another dog for damage done by the two dogs on the same occasion. In *Piper* v. *Winnifrith* (3) it was held by the

(1) 1908 S. C. 340, 350.
(2) (1853) 15 D. 486.
(3) 34 Times L. R. 108.

Divisional Court that the mere fact that the dogs acted together without any concerted action on the part of the owners did not make the owners joint tortfeasors and that the county court judge was entitled to divide the damages.

VISCOUNT HAILSHAM. My Lords, this is an appeal from a decision of the Court of Session reversing the decision of the Sheriff-Substitute. The point at issue is a very short one, and the facts are not in dispute. It appears that the appellants are farmers who own a flock of black-faced sheep on a farm in Scotland. The respondent is the owner of a dog, and in the early morning of January 21, 1930, the respondent's dog, in company with another dog belonging to the other defender, who has not entered any appearance, attacked the flock of sheep belonging to the appellants. The statement in the condescendence is in these terms: "On the morning of Tuesday, January 21, 1930, about six o'clock, two dogs, a cross-airedale belonging to the first-named defender and a collie belonging to the second-named defender, trespassed on the pursuers' farm where the said ewes were grazing. The said dogs, acting together, attacked the pursuers' sheep, hunted and chased them, and severely bit, mauled, and worried seventeen of them." To that condescendence the answer is made: "For the purpose of this action this defender admits that his dog, along with the other defender's dog, trespassed on the pursuers' farm, and that seventeen sheep were mauled and worried by the said two dogs acting together, and that ten of the sheep have died." The damages for the total damage done to the sheep were agreed for the purposes of this action at a sum of 60*l*., and at the hearing before the Sheriff-Substitute judgment was given against the present respondent for that amount. On appeal to the Court of Session, the Court of Session held that the respondent was liable only for half of the amount, on the ground that there were two dogs who were jointly concerned in attacking and damaging the sheep, and that in the absence of any evidence as to how much of the damage was done by either of the dogs the damage must be apportioned equally between the two defenders. It is from that decision that this appeal is brought.

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It was admitted that there was nothing to show that the respondent knew that his dog had any vicious propensities, and that apart from statute he could not have been made liable. In the argument at the Bar the only ground of liability was rested upon the provision of the Dogs Act, 1906, which provides: "The owner of a dog shall be liable in damages for injury done to any cattle by that dog; and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such previous propensity, or to show that the injury was attributable to neglect on the part of the owner." The question therefore turns entirely upon the effect to be given to the provisions of that statute.

In this, as in any other case, there are two elements which have to be determined: first, the element of liability, and secondly, when liability is established, the element of damage. So far as liability is concerned, it is conceded that the section to which I have just drawn attention imposes on the respondent a liability for the injury done to the sheep by his dog; but it is said that, since his dog was concerned with another, in the absence of evidence as to how much injury each dog actually did, each must be held responsible only for half the total damage. In my view that is a mistaken construction to be placed upon the statute. I think the statute only alters the common law rule on the question of liability. Once liability is established, then the ordinary measure of damage has to be applied. It has to be ascertained how much injury "that dog" has done to the cattle—in this case to the pursuers' sheep. I think that each of the dogs did in law occasion the whole of the damage which was suffered by the sheep as the result of the action of the two dogs acting together. If that be so, then each of the owners of the two dogs is responsible for the whole of the damage which has been done, and judgment can be obtained against either of them.

Viscount Hailsham.

My Lords, reference was made to the case of *Piper* v. *Winnifrith* (1), a decision of the Divisional Court in England. The headnote in that case states that the mere fact that two dogs acted together without any connected action by their owners did not make their owners joint tortfeasors, and therefore the judge was entitled to divide the damages as he had done—that is to say, half and half between the two owners. The case does not seem to be very clearly reported, but, so far as I understand the facts, I do not think the headnote is justified by the facts as found, nor is it justified by anything I find in the judgment. The case is one in which apparently two dogs were owned by two different people living in the same house, and during one night the two dogs did a certain amount of damage to the plaintiffs' sheep. I do not find any evidence or admission that the dogs were acting together; there may have been two separate incursions by the two dogs. I notice Atkin J. (as he then was) in the concluding words of his judgment says: "Each owner might be liable for the whole damage if it could be shown that the dogs had so worked together that each had caused the whole of the damage; but that was a question of fact, and there was no evidence of it." My Lords, it seems to me that that sentence expressly saves the point which we have here to determine. In this case we have an admission that the two dogs were acting together, and, when that admission is made, then I think that in law each of the two owners is responsible for the whole of the damage, because each dog did in the eye of the law occasion the whole of the injury of which the pursuers complain.

It follows that, in my opinion, the decision of the Court below was wrong and that the judgment of the Sheriff-Substitute should be restored, and I move your Lordships accordingly.

VISCOUNT DUNEDIN. My Lords, I concur. From the very first moment in this case it seemed to me that the fallacy of the First Division's judgment was that they did not consider whether really each dog was, I will not say responsible, because that is an adjective which is more applicable to a human being than to a dog, but at least was the cause of what had happened. I think the fallacy of their view cannot be better exposed than by supposing only one sheep had been worried. Would we then have to hold that each dog had half killed the sheep, and that therefore each owner should pay for half the value of the sheep?

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(1) 34 Times L. R. 108.

LORD WARRINGTON OF CLYFFE. My Lords, I agree, and have nothing to add.

LORD ATKIN. My Lords, I am bound to say, with all respect to the opinions expressed in the Court below, this seems to me to be a very clear case for the reasons given by the noble Viscount on the woolsack and by the noble Viscount who has just spoken. I find myself quite unable to add any further reasons to those that have been given, and I am glad to think that in this matter the law of Scotland and the law of England seem to be identical. I have not the least doubt that, according to the law of England, on the facts admitted in this case the defender would be liable for the whole amount of the damages, and I respectfully concur in the criticism that has been made of the headnote in the case of *Piper* v. *Winnifrith* (1), as reported. It appears to me that the actual decision in that case was in no way inconsistent with the views that are held by the members of this House, with which I agree.

LORD THANKERTON. My Lords, I am clearly of the same opinion.

Interlocutor of the First Division of the Court of Session in Scotland reversed and interlocutor of the Sheriff-Substitute restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondent

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(1) 34 Times L. R. 108.

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Paterson to pay the costs of the action in the Inner House of the Court of Session, and also the costs of the appeal to this House.

Lords' Journals, May 14, 1931.

Agents for the appellants: *Barlow, Lyde & Yates, for Kitchen & Stevens, W.S., Edinburgh.*

Agents for the respondent Paterson: *Lee, Bolton & Lee, for R. M. and W. M. Lennox, Kilsyth, and Laing & Motherwell, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)*
1931
May 11.

DEWAR AND ANOTHER . . . . . . APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE RESPONDENTS.

Revenue—Income Tax—Trust Fund to provide Educational Endowment for Child after Fifteen—Income applied in paying Annual Premiums on Endowment Policy—Whether Child's Income for Purposes of Tax—Exemptions—Claim for Repayment of Tax deducted from Trust Income—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *ss.* 25, 28, *sub-ss.* 5, 29—*Finance Act*, 1920 (10 & 11 *Geo.* 5, *c.* 18), *s.* 18, *sub-s.* 1.

The father of a young girl conveyed a sum of stock to the appellants as trustees, and directed them to take out an educational endowment policy for such sum as could be insured for an annual payment of 30*l.* for his daughter, the endowment to begin on her attaining the age of fifteen, and to continue for four years. The income of the trust fund was dedicated to the payment of the annual premiums.

The truster further directed the appellants to utilise the educational endowment payable under the policy and any other income available from the trust fund for the education and advancement of his daughter from the time when she became fifteen until her majority. If the daughter attained the age of twenty-one the capital of the trust fund was to be made over to her absolutely, but if she died before, the fund to revert to the truster or his representatives. The trust deed contained no gift of income to the daughter.

While the daughter was still under fifteen the appellants, on her behalf, claimed repayment of income tax deducted at the source from

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* *Present:* Lord Buckmaster, Viscount Dunedin, Lord Warrington of Clyffe, Lord Thankerton, and Lord Russell of Killowen.

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a sum of 33*l*., the annual income of the stock, on the ground that that income was the income of the daughter for income tax purposes, and that, as she had no other income of her own, she was within the limit of total exemption:—

Held, that the daughter had no present beneficial right to receive the income and that the claim failed.

Decision of the First Division of the Court of Session in Scotland 1930 S. C. 787 affirmed.

Appeal from an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland (1) reversing a determination of the Commissioners for the General Purposes of the Income Tax Acts.

The appellants were the holders of a sum of stock of the approximate value of 600*l*. as trustees under a deed of trust granted by Mr. Charles Bruce of Tarriebank, Arbroath, to provide for the suitable education of his pupil daughter on attaining the age of fifteen. For the year ending April 5, 1929, the income from the stock amounted to 33*l*. and income tax was deducted therefrom at the source.

The appeal arose upon a claim by the appellants on behalf of the pupil daughter, a young child, for repayment of this income tax, and the question of law was whether this income was the income of the daughter within the meaning of the Income Tax Act, 1918.

The majority of the Commissioners held that it was, but the First Division (the Lord President, Lord Sands, Lord Blackburn and Lord Morison), reversing the determination of the Commissioners, held that it was not.

The facts are stated in the opinion of Lord Buckmaster, and are summarized in the headnote.

1931. March 17. *J. Roberton Christie K.C.* (with him *R. P. Morison*) (both of the Scottish Bar) for the appellants. The question whose is the trust income falls to be determined according to the deed of trust, not according to the policy, which merely carried out the truster's directions. The leading provision of the trust was the securing of an educational endowment for the truster's daughter, who has an immediate benefit from the application of the trust income—namely, a security for her future education. She has a jus quaesitum in the application of the trust income. She has a present right to have the income applied to a contingent purpose, and that is sufficient. The appellants are therefore entitled on her behalf to a return of the income tax.

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(1) 1930 S. C. 787.

Craigie Aitchison L.A. and *Reginald Hills* (of the English Bar) (*Sir William Jowitt A.-G.* and *A. N. Skelton* (of the Scottish Bar) with them) for the respondents. No doubt, the daughter would have a right to bring an action to enforce the trust if the trustees disregarded it. But her right is derived from her contingent benefit. The truster provides for the expenditure of his own money to secure that benefit. The question is whether the income for 1928–29, which went in the form of premiums to provide the contingent benefit, was the present income of the daughter. In one sense the expenditure was for the benefit of the daughter, but she had no immediate right to the enjoyment of this income in the year of assessment. There is no gift of the income to the daughter in the trust deed. [They referred to *Inland Revenue Commissioners* v. *Blackwell* (1); *Inland Revenue Commissioners* v. *Pakenham* (2); *Walker* v. *Reith*. (3)]

Roberton Christie K.C., in reply, referred to *Perkins' Executor* v. *Inland Revenue Commissioners*. (4)

The House took time for consideration.

LORD BUCKMASTER (read by LORD THANKERTON). My Lords, the question on this appeal is the right of the appellants, as trustees under a deed of trust, to recover on behalf of their beneficiary the return of income tax deducted for the year 1929 at the source from a sum of 33*l*., the annual income of a sum of 600*l*. 5½ per cent. preference stock of the Scottish and Southern Counties Investment Trust, Ld. Their claim is, of course, the claim of the beneficiary under the trust deed, and to succeed it is essential to establish the title

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(1) [1926] 1 K. B. 389, 391.
(2) [1927] 1 K. B. 594.
(3) (1906) 8 F. 381, 388.
(4) (1928) 13 Tax Cas. 851, 858.

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of the beneficiary to the income from which the deduction has been made.

The trust deed is dated October 17, 1927, and by it Charles Bruce, of Arbroath. "in order to provide for the suitable education of my daughter, Jill Rosalind Bruce, on her attaining the age of fifteen," transferred the 600*l.* stock before mentioned to the appellants as trustees, directing them to take out an "educational endowment assurance policy . . . . on the life of my said daughter for such sum as can be insured for an annual premium of 30*l.*, the endowment to commence upon her attaining fifteen, and to continue for four years."

In the event of the income becoming insufficient to cover the premium Charles Bruce bound himself to make good the deficiency. He further directed his trustees, from the date of his daughter's attaining fifteen until she attained twenty-one, to use for her education and advancement the educational annuity under the policy, and also any income from the trust funds that might be available.

On her attaining her majority the trustees were to make over to her the capital of the trust estate, and should she die before, the trustees were to reconvey the funds to him.

The trustees effected a policy at the annual premium of 30*l.*, providing for a policy of 3600*l.* on the life of the daughter if she attained twenty-one, and, if she did not, the insurance company bound themselves to refund the premiums with the exception of the first year with 2½ per cent. compound interest, with the option to the trustees to obtain an educational endowment policy on the daughter attaining fifteen years.

One of the options so provided enabled the premiums to be discontinued after July 6, 1942, in consideration of an endowment of 612*l.* payable in half-yearly instalments of 76*l.* 10*s.* for four years from July 7, 1942.

A question has arisen as to whether this policy is within the terms of the trust, but this it is not necessary to decide. It depends upon whether it answered the terms of the "educational endowment assurance policy" mentioned in

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the deed on the life of the truster's daughter, and upon this evidence might be necessary as to the meaning among insurance companies of an "educational endowment assurance" policy on the life of the assured.

The decision, however, really turns upon the actual terms of the trust deed itself. From these it will be observed that if the daughter dies before fifteen she receives no benefit whatever, apart from the fact that during her life she has an insurance for her maintenance and education if she does attain fifteen. This does not, in my opinion, give her any present beneficial right to receive the income, which must be applied for the purpose in which both she and her father have a contingent interest. She, if and when she attains fifteen; he, if she dies before.

In these circumstances it is impossible to say that the income is solely devoted to her absolute benefit. Further, it will be observed that nowhere under the trust deed is there any gift whatever to her of the income of the trust fund. If, therefore, she died under the age of fifteen with any part of the income for any time unapplied—and unless her death synchronised with the actual date of payment of the premium this must result—her estate would have no right to the money that was unapplied, for nowhere has it been given to her.

This, to my mind, defeats her claim to the return of tax, for that can only be made by the person entitled to the income.

This is all that arises for present decision, and it is not advisable to speculate as to whether any right would arise if she attains fifteen.

The judgments of the judges of the First Division fully express my opinion, and it is unnecessary further to add to the reasons they have given.

LORD WARRINGTON OF CLYFFE. My Lords, the appellants are the trustees of a deed of trust dated October 17, 1927, executed by Charles Bruce for the purpose of providing for the suitable education of his daughter, Jill Rosalind Bruce, on her attaining the age of fifteen years. The fund consists of a sum of stock in a company producing an income of about 33*l.* a year, from which income tax was deducted at the source. The infant Jill was born on July 7, 1927.

The appellants, alleging that the income of the trust fund is income of the infant, and, being her only income, is not subject to tax, claimed on her behalf a return of the tax which had been deducted at the source.

The claim was allowed by a majority of the General Commissioners. On the requisition of the Crown they stated a case for the opinion of the Court of Session on the question of law whether the income received by the trustees is the income of the infant so that they are entitled on her behalf to obtain repayment of income tax. Their Lordships of the First Division, by interlocutor dated June 12, 1930, answered the question of law in the negative, sustained the appeal of the Crown, and reversed the determination of the Commissioners. Hence this appeal.

The real question is whether the infant has an immediately vested interest in the income so as to be entitled to insist on its application as her income for her immediate benefit, or whether under the provisions of the trust deed her right to the income as such is a contingent interest only. The answer to this question depends on the true construction and effect of the trust deed, and perhaps on the effect of the policy, which it is found was effected in pursuance of the trust.

The trust deed is printed in full in the appendix, and I propose to refer only to those parts of it which bear directly on the present question. The object of the trust is stated to be to provide for the suitable education of the infant on her attaining the age of fifteen. The trustees are directed to take out an educational endowment assurance policy on the life of the infant for such sum as can be insured for an annual premium of 30*l.*, to commence on her attaining the age of fifteen, and to continue for four years. The trustees are directed during the years from her attaining fifteen until she attains twenty-one to utilise for her education and advancement the educational annuity payable under the policy, and also any income of the trust funds that may become available. The capital of the trust fund is to be transferred to her on her attaining twenty-one, but should she die before that age the trustees are to reconvey and reassign the whole trust funds to the donor.

In my opinion, under the terms of this deed the infant has no immediately vested interest in the income as such. Admitted that she has a jus quaesitum, this is limited to requiring the trustees to effect the policy specified in the deed, and it is provided that the endowment secured by the policy shall not commence till she has attained fifteen. If she does so, then, and not till then, are the trustees directed to utilize the income as such for her benefit. Moreover, if she dies under twenty-one the whole trust funds are to be returned to the donor. The last direction would include any unapplied income in the hands of the trustees, and accordingly if, for example, she were to die shortly before a premium becomes due, the income which would otherwise go to pay that premium would pass, not as part of her estate, but to her father. The fact is that, though by the payment of the premium she obtains a possible benefit, that benefit is of no present pecuniary value, but is wholly contingent on future events.

On the deed itself, therefore, I come to the conclusion that the income in question is not the income of the infant. As I understand the judgments of their Lordships of the First Division (except Lord Sands) this opinion agrees with their view. Lord Sands, however, prefers to rely on the terms of the policy, which he assumes to be the kind of policy contemplated by the trust deed.

The policy was one on the life of the infant, to commence at twenty-one and to continue during her life, for the sum of 3600*l.* at an annual premium of 30*l.* commencing at once. If the assured should die before twenty-one the premiums (except the first) were to be returned to the trustees with compound interest. They would then revert to the donor under the deed. The trustees had several options exercisable in certain events, of which the only material one is that

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specified in cl. 3 of the Schedule, under which they would after July 6, 1942—namely, on the infant attaining the age of fifteen—by surrendering the policy obtain the educational endowment referred to.

There seems to me to be no real doubt that, as Lord Sands says, this is such a policy as was contemplated, and, if so, it strengthens the views I have already expressed on the construction and effect of the deed itself; but I prefer to base my judgment on the deed rather than on what the trustees thought fit to do under it.

In my opinion the appeal fails, and ought to be dismissed with costs.

LORD THANKERTON. My Lords, I have had the opportunity of considering the opinion of Lord Buckmaster, and I entirely agree with it.

LORD RUSSELL OF KILLOWEN (read by LORD MACMILLAN). My Lords, I have felt considerable doubt as to the correctness of the decision which is here under appeal, the crucial question being whether the income from which the tax had been deducted was income which was held by the trustees of the deed for the sole benefit of the infant, and which therefore should be regarded as her income. In my opinion your Lordships, in seeking the answer to this question, should only have regard to the terms of the trust deed, and should not be influenced by a consideration of the terms of the policy of assurance which the trustees in fact took out. The rights of the infant must be ascertained from the language of the trust deed, and from no other document.

In the trust deed the trusts of the income of the trust fund during the minority of the infant are declared by reference to two periods. The first period ends with the infant attaining the age of fifteen years. During that time the trustees are to apply the income in payment of an annual premium of 30*l.* for the maintenance of an educational endowment assurance policy on the infant's life, the endowment to commence when the infant attains the age of fifteen and to continue for four years. The second period covers the six years from the infant's attaining the age of fifteen years until her majority. During that time the trustees are to apply the income of the trust fund for her education and advancement. If, and when, the infant attains her majority, the capital trust fund (and the income) will belong to her absolutely. If she dies under age they will belong to the settlor. It is with the income accruing during the first period that this appeal is concerned.

The difficulty which I have felt is this. While it is true to say that the application of the income during the first period will only benefit the infant contingently on her attaining the age of fifteen years, it is also true to say that, according to the wording of the deed of trust, it cannot enure for the benefit of anyone but the infant. During the second period not only is the infant the only person who can derive benefit from the application of the income, but the derivation of benefit by her is free from any element of contingency. Is the fact that if the infant were to die under the age of fifteen she would derive no benefit from the application of the income during the first period sufficient to prevent the income of that period from being regarded as income of the infant ?

Your Lordships think yes, and I am not disposed to disagree. What weighs with me is the consideration that, as has been pointed out, there is no provision in the deed which, if the infant died under the age of fifteen years, would entitle her estate to claim any portion of income which had accrued at the time of her death, but which had not yet been applied in payment of the policy premium.

The doubts which have disturbed me are those which assailed Lord Sands. Unlike him, I found myself unable to escape from them by appealing to the terms of the policy ; but upon consideration I find myself able, for the reason indicated above, to concur in the motion proposed.

VISCOUNT DUNEDIN. My Lords, I concur in the judgment of Lord Buckmaster.

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Interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, May 11, 1931.

Agents for the appellants: *Biddle, Thorne, Welsford & Gait, for Mackenzie & Kermack, W.S., Edinburgh.*

Agent for the respondent: *Solicitor for England of the Board of Inland Revenue, for Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

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KINNEIL CANNEL AND COKING COAL COMPANY, LIMITED . . . . . APPELLANTS;

AND

SNEDDON OR WADDELL . . . . . RESPONDENT.

Workmen's Compensation—Election between claiming Compensation and Action for Damages—Election by Dependants of deceased Workman—Action of Damages at Common Law by Widow and Children—Claim by Stepson under Act brought and settled while Action pending—Competency of Common Law Action—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 29, *sub-s.* 1; *s.* 43, *sub-s.* 3.

Sect. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, provides that where the injury was caused by the negligence of the employer, "nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act. . . ."

Sect. 48, sub-s. 3, enacts that any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants.

After an action of damages under the common law of Scotland had been brought against a colliery company by the widow of a miner who had been killed in the pit, on behalf of herself and children, a stepson of the deceased (who had no claim at common law) presented an application for compensation under the Workmen's Compensation Act, 1925. In that process the company paid into Court the maximum amount payable under the Act, and the arbitrator awarded the stepson compensation. In their defences to the common law action the company pleaded that the defenders having paid into Court the maximum compensation payable under the Workmen's Compensation Act, 1925, and not being liable to proceedings independently of said Act, the present action was incompetent:—

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

Held, that the option of the widow either to claim compensation under the Act or to take proceedings independently of it could not be defeated by the arbitration proceedings taken by the stepson, and that the action was competent.

Dictum of Lord Atkin in *Codling* v. *John Mowlem & Co., Ld.* [1914 2 K. B. 61, 69, repeated in *Bennett* v. *Whitehead* [1926] 2 K. B. 380, 409 disapproved.

Decision of the Second Division of the Court of Session in Scotland 1930 S. C. 796 affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk, Lord Ormidale and Lord Anderson) (1) affirming an interlocutor of the Lord Ordinary (Lord Fleming).

The following statement is taken from the opinion of Lord Thankerton:—

"On February 22, 1929, Thomas Guiness Waddell, a roadman working in a pit of the appellants, received fatal injuries through a fall of ice in the pit shaft.

On August 6, 1929, the respondent, who is his widow, as an individual and as tutrix and administratrix-in-law for her two pupil children, raised the present action at common law against the appellants for damages based on the negligence of the appellants or of those for whom they were responsible.

After the action was raised, a stepson of the deceased made an application for compensation under the Workmen's Compensation Act, 1925, to which the respondent was not a party. The stepson was a dependant within the meaning of the Act, but had no common law right of action. In the arbitration proceedings a claim was also put forward on behalf of an illegitimate child, but that claim was disallowed by the arbitrator. The appellants attempted unsuccessfully

(1) 1930 S. C. 796.

to get the arbitration proceedings sisted until the decision of the present action. In conformity with an interlocutor of the arbitrator of October 17, 1929, the appellants, who admitted liability under the Act, consigned in the hands of the Clerk of Court the sum of 600*l.*, being the maximum limit of compensation under the Act. Out of this sum, which consists of a lump sum of 300*l.* and of 300*l.* as children's allowance, the arbitrator on January 30, 1930, awarded the whole lump sum of 300*l.* to the stepson.

Meantime, on November 12, 1929, the record in the present action had been closed. The main question in this appeal arises out of the sixth plea in law for the appellants, which is as follows: 'The defenders having paid into Court the maximum compensation payable under the Workmen's Compensation Act, 1925, and not being liable to proceedings independently of said Act, the present action is incompetent and should be dismissed.' The Lord Ordinary repelled that plea in law and approved an issue for the trial of the cause. On a reclaiming note for the appellants, the Second Division of the Court of Session adhered to the decision of the Lord Ordinary; hence the present appeal."

1931. March 9. *Carmont K.C.* (with him *James R. Marshall*) (both of the Scottish Bar) for the appellants. The question is whether upon the construction of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, an employer has a twofold liability: (1.) at common law, and (2.) under the Act. Where the injury is caused by the fault of the employer that section gives the workman an option either to claim compensation under the Act or to take proceedings independently of the Act, but the section goes on to provide that the employer shall not be liable to pay compensation for injury to a workman arising out of and in the course of his employment both independently of and also under the Act. Sect. 48, sub-s. 3, of the Act of 1925, provides that any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants. But the right to elect given by s. 29, sub-s. 1, is subject to the express condition that only one

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payment should be exacted from the employer, and it is unreasonable that because the option conferred by the section has been extended to several persons, the statutory condition by which that option is limited should be ignored. The latter part of that sub-section gives a right to the employer, independent of the exercise of any option, not to pay twice over: per Lord Atkin in *Codling* v. *John Mowlem & Co., Ld.* (1) It is true that that view was not indorsed by the Court of Appeal in that case, but in *Bennett* v. *Whitehead* (2) Lord Atkin adhered to his opinion. It follows that the appellants, having already paid the maximum compensation for which they are liable under the Act, cannot be made liable to pay damages independently of that Act, and that the action is incompetent. [He also referred to *Pollok* v. *Workman* (3); *Blain* v. *Greenock Foundry Co.* (4); *M'Ginty* v. *Kyle* (5); *Gill* v. *Fortescue* (6); *M'Cafferty* v. *MacAndrews & Co.* (7)]

Sir M. P. Fraser K.C. and *D. P. Blades* (both of the Scottish Bar) were not called on.

The House took time for consideration.

1931. April 25. Lord Buckmaster (read by Viscount Dunedin). My Lords, on February 22, 1929, Thomas Waddell was severely injured in the coal pit of the appellant company. The injury was due to a heavy fall of ice in the pit shaft, which crashed on to the roof of the cage in which Waddell was standing for the purpose of being raised to the surface. When the cage was brought to the surface, it was found that he was dead. He left a wife and two children, who are the respondents in this appeal, and also a stepson. The stepson, being a dependant of the deceased under the Workmen's Compensation Act, 1925, was entitled to take proceedings under that statute. The widow and the two children, in addition to their rights under the statute, possessed rights under the common law of Scotland, reproduced in England under Lord Campbell's Act, rights which the stepson did not share.

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(1) [1914] 2 K. B. 61, 69; affirmed [1914] 3 K. B. 1055.
(2) [1926] 2 K. B. 380, 409.
(3) (1900) 2 F. 354.
(4) (1903) 5 F. 893.
(5) 1911 S. C. 589.
(6) (1913) 6 B. W. C. C. 577.
(7) [1930] A. C. 599.

The widow and her two children took proceedings to enforce their common law remedy, and, after these proceedings had been instituted, the stepson took proceedings alone under the Workmen's Compensation Act, in which the appellants paid into Court the sum of 600*l*., the maximum compensation payable by them under the statute.

It is alleged that the result of this has been to defeat the common law rights of the respondents. The Lord Ordinary decided against this plea, and his interlocutor was adhered to by the Court of Session without dissent.

Before considering the effect of the statute, it is not irrelevant to remark that, if it has in fact the effect contended, the result would be that an indisputable right possessed and asserted by the respondents to bring forward their claim at common law, based on wholly different principles from those which would support a claim under the statute and leading to a different result, has been rendered incompetent by the action of a third party, in proceedings to which they were not parties and were unable to control. It is plain that this could not happen unless such rights have been destroyed by statute, and this, it is alleged, is the result of s. 29 of the Workmen's Compensation Act, 1925. This section is in these terms :—

"ALTERNATIVE REMEDIES, &C.

Sect. 29, sub-s. 1 : When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act ; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

The first thing to notice is that the section begins by an express provision that nothing shall affect the civil liability of the employer in case of negligence, but that the workman may in this event, at his option, select which remedy he will pursue. It is the latter part of the section upon which the appellants rely. They say that it emphatically provides that in respect of an injury to the workman, the employer cannot be called upon to pay in two independent proceedings. In my opinion the section has not that effect. The latter provision is intended to relate only to cases where the proceedings are taken by the same persons and affects only the cases where the workman proceeding under the statute had the option of proceeding either under the statute or at common law. The claims of the widow and children of proceeding at common law cannot be defeated by the act of somebody to whom the common law remedy is not open. To hold otherwise would be to declare that the statute had, in special cases, inferentially destroyed the rights which, by the earlier part of the section, had been expressly kept alive.

The appellants, however, did have in their favour certain dicta of Lord Atkin in the case of *Codling* v. *John Mowlem & Co., Ld.* (1), and there is no doubt that, if these dicta were an authoritative exposition of the law, the appellants would be justified in their contention, for the learned judge there says that the provisions referred to in the latter part of the section give to the employer the right, independent of the exercise by any one of the option, not to pay twice over; and, further, that this would be the result, although payment under the statute was made without the knowledge and consent of the plaintiff who was seeking to enforce common law rights. It is plain that these statements were outside the necessity of the decision, for, in that case, it was distinctly held that the widow, who was seeking to enforce her common

(1) [1914] 2 K. B. 61, 69.

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law remedies had consented to the proceedings to obtain compensation under the statute, but the opinion was certainly carefully expressed and was again repeated in the case of *Bennett* v. *Whitehead*. (1) It must, however, be observed that, in the case of *Codling* v. *John Mowlem & Co., Ld.*, in the Court of Appeal (2), Lord Wrenbury, who was then sitting in the Court of Appeal, referred without approval to the expressions of opinion given by Lord Atkin in the Court of first instance, and in any event they are only dicta, and therefore have little binding authority even in Courts of co-ordinate jurisdiction. It is well, I think, to say that I do not regard them as a correct exposition of the law.

The appellants, however, seek to enforce their case by reference to the case of *Gill* v. *Fortescue*. (3) In that case the children of a deceased workman claimed compensation under the statute, and the widow elected to sue under Lord Campbell's Act. The employers paid into Court the full amount of the compensation, and the question at issue was whether in these circumstances the children were entitled to the whole sum, when the mother was taking proceedings under Lord Campbell's Act. The Master of the Rolls, delivering the judgment of the Court of Appeal, held that they were. This case does not come before us for criticism, but it is at least remarkable that it was nowhere suggested that the action of the children had defeated the widow's rights, and that is the issue to be determined here. The judges of the Court of Session are unanimously against the appellants, and for the reasons I have given, I think their judgment is correct.

VISCOUNT DUNEDIN. My Lords, Thomas Waddell, a workman in the employment of the appellants, lost his life by a pit accident in February, 1929. The respondent is his widow, suing for herself, and as tutrix of his pupil children. In August, 1929, she raised the present action at common law against the appellants, alleging fault on their part and

(1) [1926] 2 K. B. 380, 409.

(2) [1914] 3 K. B. 1055.

(3) 6 B. W. C. C. 577.

concluding for damages and solatium. The appellants lodged defences denying fault. Subsequently to this a stepson of the deceased raised proceedings in the Sheriff Court for recovery of compensation under the Workmen's Compensation Act. The appellants seem to have delayed the adjustment of the record which, in ordinary circumstances, would have taken place on October 15 till November 12, so that, when the record was closed, they added an averment to the effect that the proceedings had been raised by the stepson, that they had admitted liability, and that they had paid into the Sheriff Court the sum of 600*l.*, which was the maximum sum for which they could be held liable in Workmen's Compensation proceedings, and they added a plea in law as follows: "(6.) The defenders having paid into Court the maximum compensation payable under the Workmen's Compensation Act, 1925, and not being liable to proceedings independently of said Act, the present action is incompetent and should be dismissed."

The respondent explained that the proceedings by the stepson were taken without consultation with her, he being quite independent of her and not in any way under her control, and that she was no party to the said proceedings.

The Lord Ordinary repelled the sixth plea and ordered issues. The appellants reclaimed. By the time that the reclaiming note was dealt with by the Inner House—namely, in June, 1930—the appellants informed the Court, although the statement was not technically made part of the pleadings, that the said stepson had been awarded 300*l.* of the said 600*l.* consigned. The Second Division adhered to the Lord Ordinarys' interlocutor, and the appellants have now appealed to your Lordship's House.

It is not necessary to do more than relate the simple facts to make one realize how startling is the proposition put forward by the appellants. Here is a widow with a perfectly good claim against the appellants (for the purposes of the argument, it must be assumed that the claim is well founded), and she is to have that claim defeated by the fact that another person, who has no such claim as she has and over whom she has no authority or control, chooses subsequently to raise other proceedings and obtain compensation under the Workmen's Compensation Act. Let it be remarked that the widow (and when I say widow I mean her in her double capacity as widow and tutrix of her children) has a claim, not, as in England, under Lord Campbell's Act, though I doubt if that would make any difference, but at common law, and that claim is not in any sense derivative from the rights of the husband as, e.g., would be a claim of an executor when a man had raised action for injury received and died before decree, but is, in the words of Mr. Bell, an action not in a representative capacity but in their own right: Bell's Pr. 546. All this is said to follow from the words of s. 29, sub-s. 1, of the Act, which has been already quoted by Lord Buckmaster. Now, as was clearly pointed out by the Lord Justice-Clerk in his judgment, the opening words of the section point all the other way, for they say that ordinary civil liability is not to be affected, and, as he goes on to say: "The mention of an option points all the same way." For, if the appellants were right, the stepson, who had no option, could, by exercising his right, destroy the possibility of the widow's option.

These two considerations, weighty as they are, do not exhaust the curious possibilities which would follow the success of the appellants' argument. If they are right, and if the widow had been very prompt and managed to secure a decree before the stepson secured his compensation, the same argument would defeat the stepson as is used here to defeat the widow.

The whole argument is rested on the last portion of s. 29, sub-s. 1, and on the opinion expressed by Lord Atkin (then Atkin J.) in *Codling's* case (1), and repeated by him in *Bennett's* case. (2) Now, it is evident that the dictum, for such it was, was not necessary for the decision of *Codling's* case (1), for it was held that the widow had made her election in favour of proceedings under the Workmen's Compensation Act, and the dictum was pointedly disapproved of by one judge and not accepted by the other two judges in the appeal in that case. (1) I also have to remark that when Lord Atkin says in *Bennett's* case that *Codling's* case "was decided on the ground that the employer had, in proceedings under the Act, paid into Court the maximum amount to which he was liable, and that sum had been paid out," he takes a view of the decision which I find it quite impossible to reconcile with the judgment of the Court of Appeal.

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(1) [1914] 2 K. B. 61, 69.

(2) [1926] 2 K. B. 380, 409.

As regards my own opinion, that was expressed in a dictum, not absolutely necessary for the decision of the case, just as was the opinion of Lord Atkin in *Codlin's* and *Bennett's* cases, but quite clearly, I think, in the case of *M'Ginty* v. *Kyle* (2), which was quoted in extenso by the Lord Justice-Clerk. And then there is the case of *Blain* v. *Greenock Foundry Co.* (3), which, although different in circumstance, is equally incompatible with the universality of the dictum proponed by Lord Atkin.

I have already pointed out the absurdity to which the appellants' contention might lead. The argument, accordingly, depends on the view that the term "workman" is exactly represented by, not the dependants taken individually, but as a body. As a body, it is said, they must exercise the option. I asked learned counsel how they were to arrive at a decision. "Oh," he said, "they must settle that among themselves." Applying that to this case, they must settle as a body whether they would exercise an option, when one of the persons to settle has no option at all. But it is said: "What matters absurdity? This is an Act of Parliament, and absurdity is no answer." But absurdity, as against what is not, is a help to determination of meaning. Nor do I think that there is here any real difficulty. The compensation to be paid by the employer may be viewed as a lump sum, and an aggregate of what is actually called a lump sum, plus a children's allowance if there are such. But the claim to participate in this lump sum is an individual claim, and what I think the section means to say, and what involves no

(1) [1914] 3 K. B. 1055.
(2) 1911 S. C. 589, 592.
(3) (1903) 5 F. 893.

absurdity, is that no individual is to get two payments, one at common law and the other under the Act.

My Lords, this disposes of the case, and I do not intend to say more. It is quite obvious that what we were told as to what the arbitrator had done—namely, given the whole fund except the children's allowance to the stepson—raises the consideration of whether he was right in doing so. It has to be kept in view that the widow, if she fails in the action, has, by sub-s. 2 of s. 29, a right to obtain compensation. But all this it is inexpedient to deal with now, because the stepson is not before us, and I express no opinion as to whether *Gill* v. *Fortescue* (1) was rightly decided or not, or as to whether, to make her compensation safe, the widow ought to have entered appearance in the compensation proceedings to enter a caveat against the whole of the fund, except the children's allowance, being paid away.

A second point in this appeal, as to the striking out of certain averments and sending the case to proof instead of ordering issues, has been settled by the judgment of this House a few days ago. I therefore concur in the motion proposed. (2)

LORD WARRINGTON OF CLYFFE. My Lords, this appeal raises a question on the construction of the Workmen's Compensation Act, 1925, of considerable novelty and importance.

The respondent is the widow of Thomas Guiness Waddell, who on February 22, 1929, died as the result of an injury by accident arising out of and in the course of his employment by the appellants.

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(1) 6 B. W. C. C. 577.

(2) In *Kinneil Cannel and Coking Coal Co., Ld.* v. *Collins or Kane*, an action arising out of the same accident, the appellants asked that certain allegations in the condescendence relating to the use of steam-pipes in the pit should be deleted as irrelevant on the ground of vagueness, and further that in any event the case should be withheld from trial by jury and a proof allowed. The Lord Ordinary disallowed both claims, and the Second Division agreed with him. On March 9, 1931, the House of Lords, without hearing the respondents' counsel, affirmed the decision of the Second Division. The same point was taken on the present appeal.

On August 6, 1929, the respondent, on her own behalf and as tutrix and administratrix of her pupil children, raised in the Court of Session an action under the common law of Scotland against the appellants charging them with negligence causing the death of the deceased and claiming damages accordingly. She had not made any claim, either on behalf of herself or of her children, to compensation under the Workmen's Compensation Act, 1925. The raising of the action was, one would have thought, a final and complete exercise by her and her children of the option given to the workman by s. 29, sub-s. 1, of the Act. It will be remembered that under s. 48, sub-s. 3, the reference to the workman in s. 29, sub-s. 1, includes a reference to his dependants.

After the raising of the action a stepson of the deceased, who was a dependant under the Act, made a claim as such, and by an interlocutor of the Sheriff-Substitute the claimant was found to be entitled to compensation, which, on the admission of the present appellants, was assessed at the maximum sum of 600*l*., which sum was paid into Court pursuant to the Act. 300*l*. has since been paid out to the claimant as his share of the compensation; the balance remains in Court.

Neither was the widow nor were her children parties to the proceedings under the Act, nor had they or any of them any right to control the action of the stepson. The latter had no right of action at common law.

In the action the appellants raised as one of their pleas in law that they, having paid into Court the maximum compensation under the Act, and not being liable to proceedings independently of the Act, the action is incompetent and ought to be dismissed.

This plea was rejected by the Lord Ordinary, and an appeal from this decision was refused by the Second Division of the Court of Session by an interlocutor dated June 12, 1930. The present appeal is from this interlocutor.

The appellants found their contention on the following words in s. 29, sub-s. 1: "The employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act"; and they say that having under the stepson's claim paid the maximum sum payable under the Act, they cannot be liable to pay damages in the action. They also say that under s. 48, sub-s. 3, the dependants must be treated as one and indivisible, and that a claim by one of them followed by payment of compensation, even if only made into Court, for ever debars the prosecution by other dependants of any right of action independently of the Act.

My Lords, I cannot follow this argument. The pursuers in the action were entitled to an option either to proceed at common law or under the Act. This they have exercised. They are thus entitled to pursue their action. They have not received any part of the 600*l.*; 300*l.* of this remains in Court. The words of the section will be amply satisfied by excluding the widow and children from any part of the fund in Court should they recover damages in the action. So far as the appellants' argument relies on s. 48, sub-s. 3, I reply that I can see no reason for reading "dependants" in that section as describing a body which is deemed to be one and indivisible. The rights of the several dependants are not identical, and it seems to me quite impossible to hold that the independent action of one should deprive the others of the benefit of an option, conferred upon them by the Act, which option they have effectually exercised. The other point raised by this appeal has in effect been decided in the respondent's favour in *Kane's* case.

The result is that in my opinion this appeal fails and should be dismissed with costs. I would only add a word or two in reference to the case of *Gill* v. *Fortescue.* (1) In that case the widow, one of the dependants, who was desirous of proceeding under Lord Campbell's Act, was excluded from the compensation on the ground that the dependants who had obtained the award could not be prejudiced by the conduct of one who might have joined in the claim but did not do so. The principle upon which the Court acted is one which

(1) 6 B. W. C. C. 577.

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would support the view I have arrived at. Whether the actual result was right may be a matter of doubt. As to this I reserve my opinion.

I agree with the opinion of my noble and learned friend, Lord Buckmaster, as to the dictum of Mr. Justice Atkin (as he then was) in *Codling's* case. (1)

LORD THANKERTON (read by LORD MACMILLAN) (after a narrative of the facts). My Lords, the question turns on the construction of s. 29, sub-s. 1, of the Act of 1925, which is as follows: " 29.—(1.) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

By s. 48, sub-s. 3, any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependants, or other person to whom or for whose benefit compensation is payable.

Where the workman is alive, the present question could not arise, for there can only be one person entitled to, and bound by, the option provided for by s. 29, sub-s. 1; but the difficulty arises where the workman is dead and more than one person is entitled to compensation under the Act, all or some of whom have also an independent right of action. The present case affords a good illustration of the difficulty.

The appellant maintains that, whether the workman is alive or dead, there is only one option provided for by the section, and that the employer's whole liability must be either under the Act alone, or entirely independently of the Act. In other words, when the workman is dead, the option is that of a class, and the definite exercise of that option by one or more members of the class exhausts the right of choice of the class and of all those who compose the class. It is not really material to this question that in the present case the stepson has obtained the whole of the lump sum compensation, though it may illustrate a possible hardship. But a consequence of the construction maintained by the appellant would be, for instance, that one member of the class, who has no right of action independently of the Act, can deprive the remaining members of the class of their independent rights of action, however well justified and valuable those rights may be.

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(1) [1914] 2 K. B. 61, 69.

In my opinion such a result would render nugatory the express provision of the section that nothing in the Act "shall affect any civil liability of the employer." The right of the respondent to sue the present action is a right arising to the respondent herself as an individual and on behalf of her two pupil children, and is not derived from her deceased husband; these are three independent rights of action, and I am unable to read the words "any civil liability" otherwise than as referring to such rights separately. I am therefore of opinion that each person, who is entitled to compensation under the Act on the death of the workman and who has also a right of action independently of the Act, has an individual option under s. 29, sub-s. 1.

Turning to the cases, that of *Blain* v. *Greenock Foundry Co.* (1) is of little assistance, for the pursuers in that action, which was at common law for damages, were only partial dependants of the deceased workman, and partial dependants were not within the definition of workman in the Act of 1897.

In *M'Ginty* v. *Kyle* (2) the deceased workman had left a father, a mother and three sisters; the father duly gave notice of a claim in terms of the Workmen's Compensation Act, 1906, and in terms of the Employers' Liability Act, 1880, and thereafter raised an action at common law and

(1) 5 F. 893.

(2) 1911 S. C. 589, 592.

under the Employers' Liability Act, in which he failed. He then took advantage of s. 1, sub-s. 4, of the 1906 Act, and asked the Court to assess his compensation under the Act. The mother and sisters then persuaded the Sheriff-Substitute to sist them in the proceedings; after a proof, the Sheriff-Substitute found that the father, mother and eldest sister were not dependants and repelled their claims, but found that the two younger sisters were partially dependant and awarded them compensation. On a case stated by the Sheriff-Substitute, the First Division held that he was not entitled to sist the mother and sisters, as the privilege of reverting to the statutory compensation conferred by the section—now s. 29, sub-s. 2, of the 1925 Act—was personal to the person who had raised the proceedings independently of the Act. Lord Dunedin (then Lord President), in whose judgment the other members of the Court concurred, said: "Your Lordships will remember that claims under the Workmen's Compensation Act and actions at common law are quite distinct, and though there may be persons who have both remedies, there are also persons who have only one, and the deceased sisters could not have raised an action of damages at common law for the death of their brother. But if they could have shewn that they were dependants in the sense of the Workmen's Compensation Act, they at once had a claim for compensation, and there was nothing to prevent them prosecuting that. The father and mother, on the other hand, had an action at common law if they chose to exercise it; but what had the sisters to do with that?" That opinion appears to me clearly to mean that the father and mother's right of choice between a claim under the Act and proceedings independently of the Act, could not be affected by, and equally could not affect, the sisters' right to claim under the Act, and it entirely confirms the opinion that I have already expressed.

In *Codling* v. *John Mowlem & Co., Ld.* (1), the workman had left a widow and six infant children. The widow had

(1) [1914] 2 K. B. 61; affirmed by the Court of Appeal [1914] 3 K. B. 1055.

raised an action for damages, and the children had claimed and been paid compensation under the Act. The defendants maintained that the widow's action was barred by the payment of compensation under the Act, and the matter turned on the construction of s. 1, sub-s. 2, of the Act of 1906—now s. 29, sub-s. 1, of the Act of 1925. The material facts which the Court held themselves bound to assume were stated in the opinion of Buckley L.J. (at p. 1062) as follows: "That of the seven dependants six claimed under the Act, that the seventh had notice of those proceedings, and that she attended and renounced her rights in the 300*l.*, which was the maximum sum under the Act, and consented to the award apportioning it among the six children." The Court of Appeal affirmed the decision of Lord Atkin (then Atkin J.), that the widow was barred by these facts from proceeding independently of the Act, but Lord Atkin had also expressed another ground of judgment; he said (at p. 66) in reference to the section: "It may emphasize and confirm the provision confining the workman to one only of the alternative remedies, but it also gives a right, independent of the exercise by any one of an option—i.e., a right not to pay twice over"; and (at p. 69): "I have dealt fully with the facts upon the first point in case I should be wrong in holding that the proviso that the employer is not to be liable twice over affords a separate protection to the employer in addition to the right to have the workman bound by his election. But being of opinion, as I am, that it does afford a separate defence, I think that on this second point the employers are entitled to succeed. The employers have been made liable to pay and have in fact paid compensation for injury to a workman by accident arising out of and in the course of his employment under the Workmen's Compensation Act, 1906, by an award duly made. It seems to me immaterial whether such liability was imposed and payment made with the knowledge and consent of the plaintiff or not; but in this case the plaintiff both knew and consented. . . . . I have not under the circumstances had to determine what the legal position is when some dependants seek to pursue one remedy and some another before any liability of the employer is established. It appears to me a condition of things which might well arise, and, as far as I know, there are no provisions in the Act or Rules providing for it. The question in my view does not arise here, and I express no opinion about it." This ground of judgment was not accepted in the Court of Appeal. Buckley L.J. says (at p. 1062): "It seems to me that there has been a proceeding in her presence, which was a complete adjudication under the Act of 1906, and she cannot now say that she is entitled to proceed independently of that Act. This is in accordance with the view taken by the learned judge in the Court below. There is, however, one sentence in his judgment upon this part of the case with which I do not agree. He says this: 'It seems to me immaterial whether such liability was imposed and payment made with the knowledge of the plaintiff or not.' As at present advised, I doubt whether that is so. If it had been made without her knowledge and consent a very different question would have arisen. It is not, in my opinion, immaterial whether she knew and consented." Kennedy L.J. said (at p. 1064): "The misfortune, I think, is that the learned judge's decision in the Court below is expressly given upon a view that it is immaterial whether the liability was imposed and payment made with the knowledge and consent of the plaintiff. I base my judgment on the fact that it is not immaterial"; and Phillimore L.J. said (at p. 1064): "I have nothing further to add except that, like other members of the Court, I reserve the right of dealing with the point as to whether or not it was material that the liability was imposed and payment made under the Act of 1906 with the knowledge and consent of the plaintiff. I do not wish to say anything different in that respect from what the other members of the Court have said." It appears that the Court of Appeal were at least unsympathetic to this view of my noble and learned friend, Lord Atkin, who expressed his continued adherence to it in the later case of *Bennett* v. *Whitehead*. (1) In any event I

(1) [1926] 2 K. B. 380, 408.

regret to find myself unable to agree with the view of my noble and learned friend on this point, which, so far as I am informed, is the only expression of judicial opinion which is inconsistent with the views I have ventured to express.

For the purposes of their argument the appellants referred to the case of *Gill* v. *Fortescue* (1), in which it was held by the Court of Appeal that, if one of the persons entitled stands aside and makes no claim under the Act, in order to proceed independently of the Act, the other persons are entitled to take the whole statutory compensation fund without deduction in respect of the interest of the person standing aside. This question does not arise for decision in the present case, and I desire to reserve my opinion as to the soundness of that decision.

A minor point was raised as to the deletion of certain averments from the closed record, which is identical with the same appellants' contention in their appeal in *Kane's* case, and must therefore be similarly rejected.

In my opinion the appeal should be dismissed, and the unanimous judgments of the Courts below affirmed.

LORD RUSSELL OF KILLOWEN (read by LORD TOMLIN). My Lords, the main point argued on the hearing of this appeal is of general importance.

The other matters argued on behalf of the appellants do not call for notice beyond the statement that the judgment of this House, already pronounced in *Kane's* case, decides them adversely to the appellant.

Whether the appellant is right or wrong upon the main point depends upon the true construction of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925. The sub-section suggests no such difficulty as arises here, if the injured workman is alive. The difficulty arises when he has died, and s. 48, sub-s. 3, comes into play.

I need not repeat the facts of the present case: they have already been stated. The contention of the appellants' counsel in relation thereto I understand to be as follows: By s. 29, sub-s. 1, when read in the light of s. 48, sub-s. 3,

(1) 6 B. W. C. C. 577.

the Legislature has, he says, enacted that when the injury has been caused as therein stated nothing in the Act shall affect the civil liability of the employer, " but in that case the dependants may at their option either claim compensation under this Act or take proceedings independently of this Act, but the employer shall not be liable to pay compensation . . . . both independently of and also under this Act." The dependants, he contends, must be treated as one group who have to exercise the option, and once (as here) any one or more of the group has or have claimed and obtained payment of the full compensation payable by the employer under the Act, no other member of the group can take proceedings against the employer independently of the Act.

If this contention is sound some curious features suggest themselves. No provision is to be found anywhere in the Act dealing with the case where the group is not unanimous or stating how a minority is to be bound. Again, the group may be so composed that the majority of the dependants happen to be persons who have no claims outside the Act. They themselves have no option at all. Can they nevertheless exercise the group's option by proceeding under the Act, and so prevent other members of the group from asserting their claims independently of the Act ? Or can the members of the group who can claim independently of the Act shut out all claims by members of the group whose only claims arise under the Act ?

The facts of the present case illustrate vividly the extraordinary results of the appellants' contention.

The stepson has under the Act been awarded 300*l.* for himself ; with the result that he, who had no option of remedy at all, has deprived the widow and her two children of all relief : and this, be it observed, by virtue of a section which declares that nothing in the Act shall affect any civil liability of the employer.

For myself I can see no necessity for construing s. 29, sub-s. 1, in a way which produces these results. I find no difficulty in construing it in relation to the dependants of an injured workman who is dead—as if (omitting immaterial words) it ran thus: "but in that case the dependants may at their respective options either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay to any dependant compensation . . . both independently of and also under this Act."

With regard to some of the authorities which were cited, I desire to say a few words.

In the case of *Codling* v. *John Mowlem & Co., Ld.* (1), Atkin J. expressed the view in reference to the corresponding provision in the Act of 1906, that payment of compensation for injury to A. and B. under the Act by the employer freed him from liability to pay compensation, for the same injury, to C. independently of the Act; and that, whether or not C. knew of and consented to the payment under the Act to A. and B. The case with which he was dealing was one in which the proceedings outside the Act were not commenced until after award and payment under the Act had already been made: and at the end of his judgment the learned judge purports to leave open the case where rival proceedings are on foot before any liability of the employer is established. His reasoning however would seem to apply to the present case, in which, although the action at common law was first in the field, the award and payment in favour of the stepson took place before the issues in the action were adjusted. The learned judge's view was not assented to by the Court of Appeal in that case, and it should not, I think, be accepted by your Lordships in the present case.

In *Gill* v. *Fortescue* (2) the widow of a deceased workman did not claim compensation, and renounced all her interest under a pending arbitration. The employers had paid into Court an amount of compensation for all the workman's dependants. The arbitrator awarded the total amount in favour of the dependant children. The Court of Appeal held that the children were entitled to the whole amount, and that no part reverted to the employer in respect of the widow's share. Cozens-Hardy M.R. used the following

(1) [1914] 2 K. B. 61; [1914] 3 K. B. 1055.

(2) 6 B. W. C. C. 577.

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language: "And to say that the children, who do claim as dependants, are not entitled to all the sum awarded because one member of the class of dependants decided to stand out and rely on Lord Campbell's Act, seems to be an impossible contention." That was only a subsidiary point in the case, and there was little argument upon it. It was nowhere suggested that payment by the employer of the total compensation payable to dependants under the Workmen's Compensation Acts would render the widow's reliance on Lord Campbell's Act a futile thing. It may well be that the widow cannot claim any portion of the total compensation, once the arbitrator has awarded the whole amount to the claiming dependants: but I do not think that *Gill* v. *Fortescue* is an authority to prevent, and I see nothing in the Act to prevent, an arbitrator, in settling the amount payable to each dependant under s. 21, sub-s. 2, of the Act of 1925, from taking into account the fact that there are other dependants who are claiming outside the Act.

The case of *Blain* v. *Greenock Foundry Co.* (1) no doubt differs from the present case in that the persons who were there suing at common law had no claim for compensation under the Act as the law then stood, not being wholly dependent. Nevertheless the decision is inconsistent with the contention that once the employer has paid compensation under the Act he is freed from liability to pay compensation independently of the Act.

My Lords, I am of opinion that the judgment of the Second Division affirming the judgment of the Lord Ordinary was correct and that this appeal should be dismissed.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, April 25, 1931.

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for the respondent: *Boxall & Boxall, for E. I. Findlay, Wishaw, and Erskine Dods & Rhind, Edinburgh.*

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(1) 5 F. 893.

[HOUSE OF LORDS.]

H. L. (Sc.)*
1931
May 15.

PALEOKAS OR POLLOCK (PAUPER) . . APPELLANT;

AND

MOUNT VERNON COLLIERY COMPANY, LIMITED . . . . . . RESPONDENTS.

Workmen's Compensation—Accident arising out of and in the Course of Employment—Breach of Explosives in Coal Mines Order of September 1, 1913 *—Workman employed by Contractor—Obedience to Order of Employer—Workmen's Compensation Act*, 1925 (15 *&* 16 *Geo.* 5, c. 84), *s.* 1, *sub-s.* 2; *s.* 6, *sub-s.* 1.

By s. 6, sub-s. 1, of the Workmen's Compensation Act, 1925, where any person in the course of his trade or business contracts with another for the execution by or under the contractor of any work undertaken by the principal, "the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him."

The respondents, coal masters, employed a contractor to win coal in a pit they were working, and the contractor employed the appellant as a mine worker for that purpose. It having become necessary to fire certain shots in this pit, the shot-firing was entrusted by the respondents to a duly appointed fireman, who alone was authorized to fire the shots. The fireman, in breach of the Explosives in Coal Mines Order of September 1, 1913, allowed the contractor to couple up the cable employed in the process of shot-firing to the shot, the fireman then connecting the other end of the cable to the firing apparatus and firing the shot. After six shots had been fired in this way, the contractor, without informing the fireman, instructed the appellant to couple up the cable to the seventh shot, and while the appellant was in the act of coupling up the cable the charge exploded and seriously and permanently injured him. Upon an application by the appellant for compensation from the respondents, the arbitrator found in law that the accident arose out of and in the course of his employment and made an award in favour of the appellant:—

Held, that the accident to the appellant did not arise out of or in the course of his employment, but arose out of and in the course of the prohibited act, and that s. 6, sub-s. 1, did not apply, as the appellant was not employed on any work which the contractor had undertaken with the principal to execute.

Kerr or M'Aulay v. *James Dunlop & Co.* [1926] A. C. 377 applied.

Smith v. *Fife Coal Co.* [1914] A. C. 723 distinguished.

Decision of the First Division of the Court of Session in Scotland affirmed.

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* *Present:* VISCOUNT HAILSHAM, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, and LORD THANKERTON.

Appeal from an interlocutor of the First Division of the Court of Session in Scotland reversing by a majority (the Lord President, Lord Sands, and Lord Blackburn; Lord Morison dissenting) a decision of one of the Sheriffs-Substitute for Lanarkshire under the Workmen's Compensation Act, 1925.

The facts found by the arbitrator are stated in the opinion of Viscount Hailsham and are summarized in the headnote.

1931 May 14, 15. *A. P. Duffes K.C.* (of the Scottish and also of the English Bar) (with him *James A. R. MacKinnon* (of the Scottish Bar)) for the appellant. 1. The question raised by the appeal is, was the arbitrator entitled to hold that the appellant's injuries were caused by accident arising out of and in the course of his employment? It has been repeatedly held in this House that his decision must stand unless reached by misdirection or unless it is unreasonable. There was here no misdirection and nothing unreasonable in his decision. 2. The only point against the workman was the breach of the statutory prohibition, and the breach was not the effective cause of the accident any more than in *Smith* v. *Fife Coal Co.* (1), where, as here, the workman was only a partner in a combined enterprise, which was just the position reserved by Lord Dunedin in *Kerr or M'Aulay* v. *James Dunlop & Co.* (2) 3. The present case is indistinguishable from *Smith* (1), and the fact that the workman was connecting the cable, whereas in *Smith* (1) he had just connected it, was not a distinction affecting the principle. 4. The reasoning of the Court of Session suggesting a supposed rigid dividing line between different classes of "prohibition" was based on Lord Dunedin's judgment in *Wilsons and Clyde Coal Co.* v. *M'Ferrin* and *Kerr or M'Aulay* v. *James Dunlop & Co.* (2), which were decided together. But that rigid distinction, illustrated by the success of the workman in *M'Ferrin* (2) and the failure of the workman in *M'Aulay*, (2) will not bear examination. For *M'Ferrin* (2) was held to be on all fours with the previous case, *A. G. Moore & Co.* v. *Donnelly* (3), in which Lord Dunedin

(1) [1914] A. C. 723, 729.

(2) [1926] A. C. 377.

(3) [1921] 1 A. C. 329.

had taken part. And, although in *Donnelly*, as in *M'Ferrin*, it was merely a time prohibition—not a class of work prohibition—that had been broken, the decision was that the infringement had taken the workman completely out of his sphere of work. Accordingly, on the supposed rigid distinction M'Ferrin, like M'Aulay, was also outwith the sphere of employment, and on the reasoning of *M'Aulay* (1) the amendment introduced by the 1923 Act, now embodied in s. 1, sub-s. 2, of the 1925 Act, could not operate in the workman's favour. Lord Dunedin's reasoning on that matter was not essential to the decision in *M'Aulay* (1), and being erroneous should not be applied here. The essential basis of decision in *M'Aulay* (1) was that the workman had (without qualification or the special circumstances present in this case) "arrogated to himself" work in no way falling to him. In the present case, like the case of *Smith* (2), there was no arrogation, and *Smith* (2) should be applied and followed. 5. As regards the matter of the principal's liability under s. 6, sub-s. 1, on the facts there was no room for distinction here between the position of the immediate employer and the principal as regards liability. The accident had arisen out of work with which in ordinary circumstances the workman was brought into contact. The accident was incidental to the work contracted for—namely, winning coal in co-operation with the fireman employed by the principal.

[He also referred to *Wood* v. *Garscube Colliery Co.* (3) and *Plumb* v. *Cobden Flour Mills Co.* (4)].

J. Carmont K.C. and *James R. Marshall* (both of the Scottish Bar) for the respondents were not called on.

Viscount Hailsham. My Lords, the facts in this case are simple. The respondents, the Mount Vernon Colliery Company, Ld., are coalmasters working a pit near Shettleston in Scotland. They employed a man named Ritchie as a contractor to win the coal in one part of the pit, and Ritchie had in his employment for that purpose a workman, who is the present appellant. In April, 1930, whilst the contractor was carrying on his contract and whilst Pollock was in his employment, there came a time when it was necessary to fire certain shots in the pit. The shot-firing was no part of Ritchie's duty, and was in fact entrusted by the respondents to a fireman who was duly authorized for that purpose in accordance with the Statutory Rules and Orders which were enacted in 1913. The fireman, in breach of his duty under that Order, allowed Ritchie to couple up the cable—which electrically fired the shots—with the shots, and Ritchie in six successive instances so coupled up the cable, the fireman then coupling the other end of the cable to the electrical discharge and switching on the current and so firing the shots. After six shots had been fired Ritchie, disliking the fumes and smoke which had arisen, instructed the present appellant to couple up the cable to the seventh shot. The fireman saw Ritchie returning to his place, assumed that Ritchie had coupled up the cable in the ordinary way, switched on the current, and fired the shot. In fact at the moment when the current was switched on the appellant was in the act of connecting the cable to the shot, and the shot accordingly exploded in his face and seriously injured him. In consequence of that accident the appellant instituted proceedings under the Workmen's Compensation Act, claiming for serious and permanent disablement arising out of and in the course of his employment. The learned Sheriff-Substitute found the facts as I have stated them and awarded compensation, because he found in law that the appellant's act of coupling the cable of the battery with the detonator wires was done for the purpose of and in connection with the respondents' trade or business, and that the appellant's injuries were arising out of and in the course of his employment. He stated the question of law for the opinion of the Court to be whether he was entitled to hold that the accident which caused the workman's injury arose out of and in the course of his employment with the colliery company. That question the First Division of the Court of Session answered in the negative, holding that the case was covered by a decision of your Lordships' House in the case of *Kerr or M'Aulay* v. *James Dunlop & Co.* (1) In *M'Aulay's* case a workman employed in a pit arrogated to himself the duty of coupling up the cable and the shot; and the fireman, in ignorance of his having done that, was manipulating his switch in order to get it free from some jamming that had taken place, and the result was that the shot exploded and M'Aulay was very badly injured. I think that the decision in that case and the principles laid down in that case completely cover this case but for one distinction. That distinction is this: Whereas in *M'Aulay's* case the workman acted on his own initiative, in the present case the present appellant was acting on the instructions of Ritchie, the contractor. The question which then arises is whether that makes any difference. It was suggested that it did make a difference by reason of the provisions of s. 6, sub-s. 1, of the Act of 1925. That sub-section provides: "Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him." It is sufficient to say that the facts of this case do not bring it within the terms of that section. The only work which the respondent company had contracted with Ritchie to execute was the winning of coal, which did not include any part of the shot-firing, which remained under their exclusive direction. Accordingly, even assuming—and I do not express any opinion one way or the other—that Ritchie's instructions to Pollock to couple up the cable would have made Ritchie liable to Pollock under the Workmen's Compensation Act for injuries sustained by him whilst he was doing that act, it is, I think, plain that Pollock was not employed in the execution of any work which the contractor had undertaken with the principal to execute, and therefore the accident to Pollock does not fall within the terms of s. 6.

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(1) [1926] A. C. 377.
(2) [1914] A. C. 723.
(3) 1927 S. C. 877, 884; 20 B. W. C. C. 837, 849.
(4) [1914] A. C. 62.

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(1) [1926] A. C. 377.

It is suggested also that a previous decision of your Lordships' House in the case of *Smith* v. *Fife Coal Co.* (1) governs this case. In the case of *Smith* what had happened was that a miner, in breach of the Statutory Rules and Orders, had coupled up the detonator cable with the shot, and was leaving the place where he had performed that act. The fireman, in breach of his duty not to fire a shot until he had ascertained that there was nobody in the vicinity, switched on the current and fired the shot whilst the workman was still in a place of danger, and caused serious injury to the workman. As I understand the decision of this House in that case, the principle adopted was that, although the workman had been doing something which was outside the sphere of his employment, at the time when the accident happened he was in a place where he might lawfully be in the course of his employment, and the act which he had done and which took him outside the sphere of his employment had been completed and he had returned within the protection of the Act before an accident took place, which was occasioned by the wrongful act and breach of duty of the fireman. In the present case the findings of fact obviously distinguish this case from *Smith's* case. In the present case the finding is that whilst the workman was in the act of doing the prohibited thing, that is, doing the thing he was not employed to do, the accident happened, and therefore at the time when the accident happened he was not in the course of his employment within the meaning of the section, and the accident cannot be said to have arisen out of or in the course of that employment; it arose out of and in the course of his prohibited act, and therefore comes directly within the principle which *M'Aulay's* case lays down.

In my opinion it would be unfortunate if we were to try to whittle away the principles on which these cases have been decided in this House. No doubt the distinctions are sometimes fine ones on the facts, but the principles seem to me to have been clearly laid down, and, loyally following those principles, I think that there is no course open to this House except to dismiss the present appeal, and I move your Lordships accordingly.

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(1) [1914] A. C. 723.

VISCOUNT DUNEDIN. My Lords, I concur.

LORD WARRINGTON OF CLYFFE. My Lords, I agree, and for the reasons given by my noble and learned friend on the Woolsack. I will merely state very shortly what my opinion on the case is.

In my opinion this case is covered by authority—that is to say, by the case of *Kerr or M'Aulay* v. *James Dunlop & Co.* (1) The Statutory Rules under the Mines Act in my opinion constitute a separate and distinct sphere of employment from that in which the other persons working in the mine are employed. The man in the present case was injured doing an act which was in this separate and distinct sphere of employment, and was thereby arrogating to himself something which was not within his sphere. The fact that he was acting on the instructions of the contractor, under contract with whom he was working, in my opinion cannot raise any distinction. Such order was, in my opinion, under the circumstances of this case, entirely inoperative to bring within the sphere of his employment an act which by law was outside that sphere.

LORD ATKIN. My Lords, I agree that this appeal should be dismissed for the reasons given by the noble Viscount on the Woolsack, with which I entirely agree. With respect to the last point that has been mentioned by my noble and learned friend Lord Warrington, I prefer to reserve that point entirely. In my view, for the reasons given, it does not appear to arise in this case, inasmuch as s. 6 does not apply. I think difficult questions, worthy at any rate of argument, may arise when the point comes up as to what is the effect

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(1) [1926] A. C. 377.

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of an express order given by a master to do an act which is an illegal act, and in reference to that there is no doubt that the provisions of s. 3, sub-s. 3, of the Act may have to be considered ; but as the matter does not arise for determination in this particular case I express no opinion at all about it.

LORD THANKERTON. I concur with the motion proposed and the opinion delivered by the noble and learned Viscount on the Woolsack. I also desire to reserve my opinion as to whether the order by Ritchie, in a question with Ritchie, would have enabled the appellant to take the present case out of the principles laid down and followed in the case of *M'Aulay.*

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed.

Lords' Journals, May 15, 1931.

Agents for the appellant: *Findlay M'Clure & Co., for R. Maguire, Cook & Co., Glasgow, and Allan McDougall & Co., Edinburgh.*

Agents for the respondents: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

[HOUSE OF LORDS.]

BIRCH BROTHERS, LIMITED . . . . APPELLANTS ; H. L. (E.)*

AND

BROWN . . . . RESPONDENT.

1931
June 11.

Workmen's Compensation—"Able to earn"—Review of Compensation—Loss of left Eye by Accident — Supervening Blindness in right Eye by Disease —Inability to obtain Work—Offer of Work by Employers' Insurance Company—Refusal of Offer owing to Inability—Evidence of earning Capacity—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 9.

A workman employed as a wheelwright and van driver met with an accident arising out of and in the course of his employment, which necessitated the removal of his left eye. After a period of total incapacity he resumed his work as a wheelwright, but was unable to drive a van, and he was ultimately discharged for business reasons. In respect of his injury he obtained an award of compensation, first, for partial incapacity, and, afterwards, on his application for a review in consequence of his inability to get work owing to his obvious disfigurement, for total incapacity. After he had become nearly blind owing to cataract in his right eye, the employers' insurance company offered him employment as a cleaner in their office at a wage which was double the market rate of wages for that work, but the workman refused this offer by reason of his infirmity. Upon an application by the employers for a review terminating or reducing the compensation, the county court judge found that the offer of the insurance company was a genuine offer and reduced the compensation to half the difference between the workman's pre-accident wages and the wages offered him by the insurance company:—

Held (by Lord Warrington of Clyffe, Lord Atkin, Lord Tomlin and Lord Macmillan; Viscount Dunedin dissenting), that there was no evidence on which the county court judge could properly find that the workman's proved inability to earn wages by reason of the loss of his left eye had ceased to exist, inasmuch as the offer of the insurance company, in the circumstances in which it was made, had no evidential value as a test of the man's earning capacity in the open market.

Hargreave v. *Haughhead Coal Co.* [1912] A. C. 319 and *Ball* v. *William Hunt & Sons, Ld.* [1912] A. C. 496 considered.

Decision of the Court of Appeal [1930] 2 K. B. 255 affirmed.

APPEAL from an order of the Court of Appeal (1), setting aside by a majority (Greer and Slesser L.JJ.; Scrutton L.J. dissenting) an award of the judge of the Bloomsbury County

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* *Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD TOMLIN, and LORD MACMILLAN.

(1) [1930] 2 K. B. 255.

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1931
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v.
Brown.

Court in an arbitration under the Workmen's Compensation Act, 1925.

The facts are stated in the report of the case before the Court of Appeal and in the opinions of Viscount Dunedin and Lord Warrington of Clyffe, and they are summarized in the headnote.

1931. April 21, 23, 24. *Edward Cave K.C.* and *Gilbert Paull* for the appellants. The county court judge was entitled to find, as he did, that the offer of the insurance company was a genuine offer of suitable work at which the respondent, so far as the consequences of the accident were concerned, was able to earn 3*l.* a week, and that the amount which he was able to earn was the amount which an employer was bona fide willing to pay him for his labour. The appellants were therefore entitled to a reduction of the compensation payable to the respondent. Circumstances subsequent to and not attributable to the accident are irrelevant in estimating the respondent's value in the labour market. The respondent's unfitness for work was not the result of the accident, but was the result of disease wholly unconnected with the accident, and that was a matter which the county court judge was entitled to disregard. This case is covered by *Hargreave* v. *Haughhead Coal Co.* (1), which has been followed in *Hart* v. *Cory Brothers* (2) and *Lomax* v. *Sutton Heath and Lea Green Collieries* (3), and is distinguishable from *Ball* v. *William Hunt & Sons, Ld.* (4)

[They also referred to *Harwood* v. *Wyken Colliery Co.* (5); *Taylor* v. *London and North Western Ry. Co.* (6); *Lewis* v. *Wrexham and Acton Collieries* (7); *McNally* v. *Furness, Withy & Co., Ld.* (8); *Kilpatrick* v. *Wemyss Coal Co.* (9); *Stowell* v. *Ellerman Lines* (10); *Pearson* v. *Archibald Russell Ld.* (11); *Heathcote* v. *Haunchwood Collieries.* (12)]

(1) [1912] A. C. 319.
(2) [1916] 1 K. B. 172.
(3) (1926) 19 B. W. C. C. 301.
(4) [1912] A. C. 496.
(5) [1913] 2 K. B. 158.
(6) [1912] A. C. 242.
(7) (1916) 9 B. W. C. C. 518.
(8) (1913) 6 B. W. C. C. 664.
(9) 1922 S. C. 71; 15 B. W. C. C. 379.
(10) (1923) 16 B. W. C. C. 46.
(11) 1916 S. C 536; 9 B. W. C. C. 706.
(12) [1918] A. C. 52.

Edgar Dale (with him *David Weitzman*) for the respondent. On the facts proved the respondent is now, as he was at the date of the award founded on *Ball* v. *William Hunt & Sons, Ld.* (1), totally incapacitated as the result of the accident, and the fact of his increasing blindness from cataract does not affect this incapacity. *Hargreave's* case (2) has been misapplied. It stands simply on the finding that the workman had completely recovered from his incapacity: per Sankey L.J. in *Stevens* v. *Birmingham Corporation.* (3) Assuming that the offer of the insurance company was genuine, in the sense that the respondent could have had the post but for his infirmity, having regard to the fact that it was made by a company which would have been under a liability to pay 30*s.* apart from the offer, and that the wage offered had no reference to the market rate of wages, it cannot be regarded as any evidence of the respondent's value in the labour market. [He also referred to *Cardiff Corporation* v. *Hall.* (4)]

Edward Cave K.C. replied.

The House took time for consideration.

1931. June 11 VISCOUNT DUNEDIN (read by LORD BLANESBURGH). My Lords, the facts in this case, as set forth by the arbitrator, are succinctly as follows :—

For eighteen years, up to December 1, 1926, the respondent was in the employment of the appellants. He acted in a double capacity. He worked as a wheelwright and he worked as an omnibus driver. He was paid a separate wage for each head of his employment—2*l.* 16*s.* 8*d.* for his wheelwright's work and 6*s.* 8*d.* for his driving.

On December 1, 1926, while at his work, a lynch-pin flew out and struck him in the eye. In consequence the eye had to be removed on December 19, 1926. While ill he was compensated by a payment of 30*s.* a week.

He returned to work on February 7, 1927, but after a week his driving work was stopped, as it was considered dangerous, and he was then paid the reduced wage of 2*l.* 16*s.* 8*d.*

(1) [1912] A. C. 496.

(2) [1912] 1 A. C. 319.

(3) (1929) 22 B. W. C. C. 311, 328.

(4) [1911] 1 K. B. 1009, 1020–21.

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On October 1, 1927, a large reduction in staff was made, and he was discharged.

On November 22, 1927, the respondent presented a request for arbitration under the Workmen's Compensation Act. His claim was for 3*s.* 4*d* a week, being half the sum he lost by his loss of the driving up to the time of his discharge, and thereafter such sum as the arbitrator should award.

On January 9, 1928, the judge in the county court, sitting as arbitrator, gave judgment for the said sum of 3*s.* 4*d.* a week, made a declaration that the respondent had received an injury by accident arising out of and in the course of his employment, and ordered the arbitration to stand adjourned with leave to either party to apply.

On August 28, 1928, the respondent applied to have the compensation reviewed upon the ground that he had been unable to find work owing to his condition as a one-eyed man. The appellants, on October 12, answered denying any liability on their part.

The case was heard on June 14, 1929, when the arbitrator, finding in fact that the respondent had failed to obtain work because of his one-eyed condition, found in law, upon the authority of *Ball* v. *William Hunt & Sons* (1), that the respondent was entitled to compensation as for total incapacity, and fixed the sum payable at 30*s.* per week, to continue during the said incapacity until it was ended or diminished, increased or redeemed, in terms of the Act. This state of matters continued until September 30, 1929, when the appellants obtained the respondent to be examined by the oculist who had seen him at the time of his accident, and thereafter in June, 1929. The oculist examined him, and reported that there was now an incipient cataract in the right eye which, within a few months, would make him completely blind, subject to the prospect of an operation, the result of which would be extremely doubtful.

On January 25, 1930, the appellants offered the respondent a situation to do cleaning work at 3*l.* a week, but by this time the state of affairs which the oculist had foreseen had occurred. He was nearly entirely blind from the cataract, and, though he offered to take the job if he got an escort, which escort the appellants refused to supply, the end of it all was that he could not accept the offer. Upon this, on February 17, 1930, the appellants applied for a review of the order of June, 1929. The arbitrator reduced the award of 30*s.* to 1*s.* 8*d.*., being half the difference between his original old wage of 3*l.* 3*s.* 4*d.* and the 3*l.* offered him but not accepted. He gave an explanatory note, in which he said: "I was satisfied that so far as the effects of the accident were concerned the condition of the injured workman was the same as when the matter was before me in June, 1929, when I found as a fact that he was able to do the work of a wheelwright, on which he was engaged after the accident but before his dismissal by the employers, at 2*l.* 16*s.* 8*d.* a week, but was prevented from obtaining any work by reason of the fact that he was manifestly a one-eyed man. I found as a fact on this present application that the very grave change for the worse since June, 1929, in the condition of the right eye of the injured workman, which had rendered him unfit for any employment, was wholly unconnected with the accident. I was satisfied that the offer on January 31st, 1930, by the Midland Assurance Company to employ the injured workman at a wage of 3*l.* a week was made in all respects in good faith, and that it was of work which the effects of the accident did not in any way interfere with his doing. In these circumstances I considered that the employers were entitled to ask for a review of the weekly payment ordered in June, 1929, and to have the weekly payment based on the difference between the average weekly earnings of the injured workman before the accident, that is, 3*l.* 3*s.* 4*d.*, and the amount which, so far as the effects of the accident were concerned, he could earn in the suitable employment offered to him by the Midland Assurance Company, that is, 3*l.* a week, and I accordingly order that the weekly payments be diminished to 1*s.* 8*d.*, one-half of the difference. I held that, in such a case, the amount which an injured workman is able to earn is the amount which an employer is *bona fide* willing to pay him for his labour."

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(1) [1912] A. C. 496.

Against this judgment the respondent appealed to the Court of Appeal, and that Court, by a majority (Scrutton L.J. dissenting), reversed the judgment of the arbitrator and remitted to him to find the respondent, as for total incapacity, entitled to the old sum of 30*s*. The learned judges who formed the majority, though agreeing as to result, differed as to the grounds on which the result should be arrived at. Slesser L.J. based his judgment on the fact that when the offer of employment was made the respondent was not in a fit condition to accept it, that, consequently, no suitable employment had been offered, and *Ball* v. *William Hunt & Sons* (1) still applied. Greer L.J. specially disagreed with this ground, holding that "suitable" meant suitable for the workman, so far as his condition resulting from the accident was concerned, and not otherwise. His view was that, on general principles, it ought to make no difference whether the accident which caused the loss of one eye came before or after the loss of sight in the other eye occasioned by a cause independent of the accident, and that he was not precluded from giving effect to that view by the cases of *Hargreave* v. *Haughhead Coal Co.* (2) and *Lomax* v. *Sutton Heath and Lea Green Collieries* (3) in respect that, in both those cases, the disease only began subsequent to the accident, whereas here he said the disease was incipient at the time of the accident.

Scrutton L.J., while, had he been free, he would have come to another result, felt that he was bound by the case of *Hargreave* (2), and his original view being barred by *Hargreave* (2), went along with the argument in *Stowell* v. *Ellerman Lines.* (4) He expressed himself thus (5): "Lord Sterndale considered the case of a workman partially incapacitated by an accident, but also totally and independently incapacitated by a disease, and the Court came to the conclusion that the judge was wrong in refusing all compensation because of the independent disease, but must assess

(1) [1912] A. C. 496.
(2) [1912] A. C. 319.
(3) 19 B. W. C. C. 301.
(4) 16 B. W. C. C. 46.
(5) [1930] 2 K. B. 255, 261.

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the extent of partial incapacity due to the accident. If this is applied to the present case, the judge is to disregard the incapacity due to the blindness of the non-accident eye and to consider the incapacity due to the accident. This was, till the insurance company offered work, only the incapacity of a one-eyed man in appearance who could not get work; this would be removed by the offer of work. The man cannot do the work offered because of the joint effect of the accident and disease. If in *Stowell's* case (1) one may disregard the total incapacity by disease, may one disregard here the total incapacity by disease? Here the disease alone does not create total incapacity; it is the disease plus the accident. In *Stowell's* case (1) the disease alone caused total incapacity, yet the workman was held entitled to recover for the partial incapacity by accident. If, following *Stowell's* case (1), the judge is asked to assess the partial incapacity caused by accident he is apparently to assume that there is no disease. But if in the present case one assumes no disease, the workman can do the work he is offered, and the judge's award is correct."

In considering the law, I think it is expedient first of all to say a few words as to the cases of *Hargreave* (2) and of *Ball*. (3) They are both decisions of this House, pronounced by practically the same set of noble Lords. It was, I will not say contended, but rather hinted at by counsel that they are really in conflict. I do not think they are. In *Hargreave's* case (2) the idea of a one-eyed man, who had complete sight in the other eye, being handicapped in obtaining employment was evidently not put forward as a practical proposition in the then state of the labour market, and consequently there was no discrepancy in the fact that, in *Ball's* case, where it was taken as a practical proposition, effect was given to it. But *Hargreave's* case (2) settled two other things which were not in any way displaced by *Ball's* case. (3) It entirely repudiated the idea of what we may call the "stand-by eye," and it settled that when there was complete recovery in the

(1) 16 B. W. C. C. 46.
(2) [1912] A. C. 319.
(3) [1912] A. C. 496.

sense of being able to work as before, notwithstanding the effects of the accident, the employer was entitled to have a decree of finality. Perhaps that is only the same proposition put in another way.

I therefore think that Scrutton L.J. was quite right when he said he found himself precluded by authority from dealing with the case as he would have dealt with it if entirely free. The way he would have dealt with it if free embodies the theory of the "stand-by eye." I also agree with his treatment of the case of *Stowell.* (1) That case is not binding on me as it was on him, but, as a sequel to *Hargreave's* case, I think it was rightly decided. Greer L.J.'s view if he was free was the same as that of Scrutton L.J. if he was free. If analyzed it necessarily in my opinion depends upon the doctrine of the stand-by eye. I am quite unable to see how the case of *Hargreave* (2) can be got rid of as he thinks by pointing out that the disease in the other eye was in that case supervenient, whereas in this case it was mildly incipient at the time of the accident. The incipiency had nothing to do with the accident, and was not in any way aggravated by the accident.

Now, all this is necessarily in the view that the offer of the employment was a genuine offer, as was found by the arbitrator. So far as the arbitrator finds a fact, we cannot alter the finding, but undoubtedly the legal complexion of a fact may be dealt with by a Court of Appeal. I think that all the arbitrator really found was that it was a real job which the man might have had had he not been incapacitated by causes independent of the accident. That, I think, is enough, for I need hardly say that I distinctly agree with the criticism of Slesser L.J.'s ground of judgment as expressed by Greer L.J. But I cannot hold the offer as wholly fictitious, so as to make it possible to say that legally no offer was made.

I, therefore, think that the arbitrator and Scrutton L.J. were right in thinking that there was no longer total incapacity. There remains, however, the question of the amount to be paid for partial incapacity. Scrutton L.J., when he delivered

(1) 16 B. W. C. C. 46.

(2) [1912] A. C. 319.

his judgment, knew he was to be in a minority, and therefore did not find it necessary to consider this question. I regret it, as I would like to have known if his opinion was the same as mine. My view is that when you come to a computation you must take the real worth of the job, and not the amount of what I consider an offer purely fictitious as to amount. I do not think I am going against the arbitrator's finding in fact, which, as I have already said, was, I think, that the job itself was not fictitious; but the sum offered, I think, was so, and was only, I think, offered in order to cut down the compensation. It was clearly proved that the real worth of the job was 30*s.*

Be it observed that the appellants could afford to make this fictitious offer. They were under obligation to pay 30*s.* compensation. If the offer was accepted they just had to pay what they would have had to pay if no such offer was made, that is, 30*s.* in compensation and 30*s.* to a man taken from the open market. If it was not accepted, then they could say that the wage which he might have had was 3*l.* Accordingly, I would hold that the compensation payable was half the difference between 3*l.* 3*s.* 4*d.*, the old wage, and 30*s.*, that is 16*s.* 8*d.*

LORD WARRINGTON OF CLYFFE. My Lords, on December 1, 1926, the respondent, a workman in the employ of the appellants, suffered injury by accident arising out of and in the course of his employment, as the result of which he lost his left eye.

Prior to the accident he had been in receipt of wages amounting altogether to 3*l.* 3*s.* 4*d.* a week, of which 2*l.* 16*s.* 8*d.* was in respect of his employment as a wheelwright and the balance 6*s.* 8*d.* was paid to him as a van driver.

On February 6, 1927, he returned to work in both capacities and for one week was paid his full pre-accident wages. As from the end of that week, however, it was found to be unsafe for him owing to the loss of his left eye to continue his work as a van driver, and he ceased to receive his wages of 6*s.* 8*d.* in that capacity.

On October 1, 1927, he was discharged from his employment with the appellants for reasons unconnected with his accident.

On November 22, 1927, the respondent filed a request for arbitration, and on January 9, 1928, he received an award of 3*s*. 4*d*. a week from March 16, 1927, to October 1, 1927, with a declaration of liability.

On August 28, 1928, he filed a request for review on the ground that he was totally incapacitated for work and was unable to obtain employment by reason of his injury.

On June 14, 1929, an award was made in his favour for 30*s*. a week from October 2, 1927, and to continue. This was based on the ground that, though physically fit for work, being able to see with his right eye, he was unable to get work by reason of the obvious disfigurement caused by the loss of the left eye resulting from the accident: *Ball* v. *William Hunt & Sons*. (1)

As early as December, 1926, and between that time and 1930 the sight of the right eye had been progressively deteriorating owing to the ripening of senile cataract, and at the date of the award on which the present question arises he was so far deprived of sight in the right eye as to be unable to do any work. The condition of the right eye however was not in any degree a result of the accident.

On January 25, 1930, the assurance company with which the appellants were assured by letter of that date offered the respondent work in their office as a cleaner at 3*l*. a week, which owing to the then condition of his sight was not accepted. This letter and the circumstances in which it was written will be discussed hereafter.

On February 17, 1930, the appellants filed a request for review of the award of June 14, 1929, on the ground that the respondent's condition and capacity for work entitled the appellants to a termination or diminution of the compensation. This was really based on the contention that his incapacity merely as an obviously one-eyed man resulting from the accident was displaced by the offer, that is to say, that it was no longer true to say that he was incapable of obtaining work by reason of a circumstance the result of the accident, and that his incapacity to work was due to the defect of the right eye, which was not such a result.

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(1) [1912] A. C. 496.

The matter came before the arbitrator on March 25, 1930. He accepted the view of the appellants and made an award whereby the compensation was diminished to 1*s*. 8*d*., being one-half of the difference between the 3*l*. offered by the appellants and the 3*l*. 3*s*. 4*d*. earned by the respondent prior to the accident.

On appeal to the Court of Appeal this award was by a majority (Greer and Slesser L.JJ.; Scrutton L.J. dissenting) set aside and the matter was remitted to the arbitrator for an award for total incapacity to be entered. Hence this appeal.

At the date of the application for review there was an existing condition of total incapacity arising from the fact that owing to the obvious disfigurement occasioned by the loss of one eye the workman was unable to obtain employment and thus earn wages. The growing defect in the right eye was in itself an irrelevant circumstance, it neither increased nor diminished the particular incapacity resulting from the accident. It could not, of course, increase a total incapacity, and for obvious reasons it could not diminish it. The appellants insist that the total incapacity has ceased, because they say they have proved that he would be able to earn 3*l*. a week had he accepted the offer above referred to, and can no longer say that owing to the result of the accident he is unable to earn wages. The arbitrator has given effect to this contention, and the real question is whether there was any evidence on which he could properly come to his conclusion—namely, that the man's inability to earn wages by reason of the loss of his left eye has ceased to exist.

In answering this question it must be carefully borne in mind that compensation is payable in respect only of incapacity resulting from the injury by accident, and not in respect of any incapacity not so resulting. The incapacity existing at the date of the award of June, 1929, was, however, an incapacity resulting from the injury, involving, as it did, the removal of the left eye, and the man's obvious disfigurement with its proved effect on his chances of obtaining work.

The question then is, was there any evidence before the arbitrator on which he could properly come to the conclusion that this incapacity had ceased? The only fact relied upon by the appellants was the offer contained in the letter of the assurance society dated January 25, 1930. I accept the finding of the arbitrator that this was a bona fide offer in the sense that if the man had accepted it the work would have been open to him. At the same time however it should be remembered that it was made by the persons interested in bringing about the cesser of compensation, and it is impossible to avoid the inference that it was made in the hope and expectation that whether accepted or not it would have that effect.

It was proved at the hearing that the man was then unfit for work owing to the continued deterioration of the right eye, and it was stated in evidence by the writer of the letter in question, that had the general manager who authorized the making of the offer been told of the contents of the report of Dr. Summers of October, 1929, he would probably not have engaged the man. That report was to the effect that owing to the progress of the cataract in the right eye the man would probably be totally unfit for work in a few months. I think under these circumstances it is clear that the man could not be expected to do the work, or if he did so for a week or two he would shortly be found to be incapacitated by the failure of the right eye owing to causes independent of the accident.

An offer made under these circumstances cannot in my opinion be relied upon as evidence of any earning capacity capable of displacing the existing proved inability to earn. It was made by interested parties for an object of their own and was neither actuated by a consideration of his real earning capacity nor in fact had any bearing on that question. Indeed it was admitted in evidence by a witness for the appellants that if it had been advertised there would have been hundreds of applicants, and it is in my opinion impossible to suppose that the respondent would have had the remotest chance of obtaining the job under such circumstances.

I am, therefore, prepared to hold that there was no evidence before the arbitrator on which he could properly come to the conclusion that the incapacity as the result of the accident had ceased to be total, and that for this reason the order of the Court of Appeal should be affirmed and this appeal dismissed.

If this view is correct there is not much to be said about the authorities, but I think I ought to say a few words about *Hargreave* v. *Haughhead Coal Co.* (1) In that case, as in the present, the workman had as the result of the accident lost one eye, and incipient cataract not due to the accident had appeared in the other. It had been proved or admitted that his incapacity had ceased and that he was fit to resume his former work, and compensation had ceased to be paid. The point raised in *Ball* v. *William Hunt & Sons* (2) was not raised, and there was therefore no evidence of the effect of his being a one-eyed man on his ability to earn. What was asked was that the matter should be left open in order that the man might put in a further claim should the disability recur by reason of the progress of the cataract. This was refused by this House on the ground, as stated by Lord Macnaghten (3), that "it is impossible to say that the award ought to have been kept open, unless your Lordships are prepared to hold that when a man being gifted by nature with two organs of vision loses one, the award ought always to be kept open on the chance of his losing the other before he becomes unfit to work or is unable to earn his livelihood."

This case really has no bearing on the present in the view in which I regard it.

LORD ATKIN. My Lords, I am of opinion that this appeal should be dismissed. The material facts are that in

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(1) [1912] A. C. 319.
(2) [1912] A. C. 496.
(3) [1912] A. C. 321.

December, 1926, the workman, a wheelwright and van driver, met with an accident in the course of his employment whereby his left eye was injured and in January, 1927, had to be removed. At the date of his accident his right eye had shown signs of incipient cataract. As the result of the accident he was unable to continue to drive a van and his wages were diminished accordingly: in October, 1927, he was discharged by his then employers with other workmen for business reasons. In January, 1928, he obtained an award for partial incapacity with a declaration of liability. In August, 1928, he applied for a review and in June, 1929, he obtained an award of 30*s.* for total incapacity on the ground that he was a one-eyed man and for that reason unable to obtain employment in the labour market on the principle established in this House in *Ball* v. *William Hunt & Sons.* (1) In October, 1929, he was examined by an oculist who had been advising the employer's insurance company in the case, who reported on October 4 to the insurance company that the cataract in the right eye had advanced and in his opinion would "now progress rapidly leading to a state when he will be totally unfit for work in a few months." At the end of January, 1930, the oculist's anticipation had been fulfilled: the man was practically blind and, as found by the judge on April 7, 1930, was unfit for any employment. Nevertheless on January 29, 1930, the insurance company offered the workman through his solicitors a job as office cleaner in their own offices at 3*l.* a week. The offer had to be refused by reason of the workman's infirmity of sight. Thereupon the employer applied to vary the compensation, and the judge by his award reduced the compensation to 1*s.* 8*d.*, being half the difference between 3*l.* 3*s.* 4*d.* the pre-accident earnings and 3*l.* the wages offered. He held that so far as the effects of the accident were concerned the condition of the workman was the same as in June, 1929, when he made an award for total incapacity, but that the offer of work was made in all respects in good faith, and that the effects of the accident

(1) [1912] A. C. 496.

did not in any way interfere with his doing the work offered, his inability being due to the condition of the right eye, which was wholly unconnected with the accident. From time to time the administration of the Workmen's Compensation Acts has been said to result in anomalies, but so remarkable a result has never yet appeared as that a man with the full sight of one eye may be totally incapacitated but when he has become completely blind he may revert to partial incapacity. My Lords, in the present case I do not think that such is the result. The existing award had found that by reason of the physical defect caused by the injury the labour of the workman was unsaleable in any market reasonably accessible to him. To vary the award the judge had to find some change of circumstance indicating that the labour of the workman was now saleable in a market reasonably accessible to him. For the present purpose I will assume that this investigation proceeds on the assumption that the Court is to look only to the effect of the injury as it existed at the date of the last award or has been modified since: and has not to take into account supervening disabilities not due to the accident. The employer may prove the material fact by general evidence of the state of the labour market, by proving vacancies which the workman might have filled if he had known of them, by proving actual offers to the workman of suitable work. Even one offer of suitable work may be evidence from which the arbitrator may find that the general unsaleability of the workman's work has ceased. But some experience of workmen's compensation work satisfies me that such offers, from whatever source emanating, require to be carefully examined to see whether they afford ground for the necessary inference, and certainly demand no less care when they proceed from the employer or insurance company concerned. In the case in question I am of opinion that the offer had no evidential value at all as a test of the man's power to sell his labour in the labour market. The judge has found that it was a bona fide offer. So far as that finds that there was a vacancy for a cleaner at the insurance company's office, and that they would have employed a one-eyed man, there is evidence to support it. But it is also beyond question that the offer was one which the insurance company knew the workman could not accept or accepting could not fulfil; and that the rate of wage offered was not a wage rate at all, but a weekly payment determined by the insurance company's existing liability: designed if refused to destroy the liability altogether and if accepted to give them an employee at the net increased liability to them of 30*s.* per week, which was in fact the market rate for the job. I entirely disapprove of the heartless method taken by the workman to establish the latter fact. He inserted an advertisement of a hypothetical job with the identical duties at 30*s.* a week and received several hundred answers from men all of whom were disappointed. But I have equally little admiration for the insurance company whose offer of cleaning work at 3*l.* a week to a blind man seems to me to have been mere mockery. It is sufficient to say that an offer which it is known cannot be accepted at an unreal rate of wages appears to me to afford no evidence from which the arbitrator could reasonably infer an alteration in the labour market conditions such as to justify him in finding that the employer has succeeded in displacing the existing award.

This is sufficient to dispose of the appeal, but for myself I accept the further contention put forward by counsel for the workman that in the facts of this case the employer had to show an offer of work suitable to the workman in his actual condition at the time of the offer, provided that there was still a continuing disability due to the accident. I think that the effect of the accident in removing one eye and leaving the workman with the other eye suffering from incipient disease was to put him in the position established by the judgment of Fletcher Moulton L.J. as an "odd lot in the labour market": *Cardiff Corporation* v. *Hall.* (1) I cannot distinguish this case from that of *Ball* v. *Coulthard & Co., Ld.* (2), in which a girl employed as a cotton weaver lost the sight of her right eye by accident in the course of her employment. Her left eye before the accident had been weakened

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(1) [1911] 1 K. B. 1009, 1021.

(2) (1919) 12 B. W. C. C. 312, 316.

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by an operation to cure a squint which left the muscles weak but the vision normal: with the result that the eye was weak and easily showed signs of strain, watering and pain. The Court of Appeal of which Lord Warrington and I were members found no difficulty in supporting the arbitrator's view that the girl in that condition was an odd lot: and as Warrington L.J. there says in that case, "if the workman satisfies the Court that he comes into the category described in Fletcher Moulton L.J.'s judgment, then he is entitled to be treated as not able to earn wages unless the employer proves there is actually in fact work which the workman can do if he chooses to accept it." The words of Fletcher Moulton L.J. in *Cardiff Corporation* v. *Hall* (1) are, "it is right that those who are liable to pay to him compensation for his loss of earning power should only be allowed to take credit for his partial capacity for work if they can show that it can actually be made productive of remuneration to him."

Similarly in *Kear* v. *Shelton Iron Steel, and Coal Co.* (2) a miner incapacitated by nystagmus and found by the arbitrator to be "capable of doing quite a number of labouring jobs but not capable of doing any labouring job that might be open" was held by the Court of Appeal to have been found to have been "an odd lot": the result followed that he was entitled to an award of total incapacity though his unemployment was due to slackness in the market, a fact of course not occasioned by the accident. Lord Sterndale, after stating that if the man's unemployment is due not to the accident but to the state of the labour market or any other cause which does not arise from his accident he cannot claim compensation, proceeds: "On the other hand, if a man is so disabled by the accident that his general earning capacity is injured, and therefore he cannot get employment, then the position is quite different"; and he goes on to decide that it is then for the employer to show that he can get work which would give him a certain amount of earnings per week. Lack of employment from slackness in the labour market or from supervening physical infirmity is in either case equally

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(1) [1911] 1 K. B. 1009, 1021.
(2) (1921) 14 B. W. C. C. 121, 123.

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unconnected with the accident. In the case of an odd lot, in my opinion, it has been decided and it is in my experience the ordinary practice that the employer takes the risk of any supervening cause that may interfere with the workman getting work. In other words he has to show that the workman's labour can "actually be made productive" (Lord Moulton) or that "there is actually in fact work which the workman can do" (Lord Warrington). It is common ground that in fact at the time of the employer's offer the workman was unable to do the work or indeed any work, and I think therefore that the employer's application to review failed and should have been dismissed. Reference was made in the argument to the case of *Hargreave* v. *Haughhead Coal Co.* (1) So far as that case is said to conflict with *Ball* v. *William Hunt & Sons* (2) I think that the criticism is illfounded. It is noteworthy that *Ball* v. *William Hunt & Sons* (2) was argued before the same members of your Lordships' House as decided *Hargreave's* case (1) a fortnight before the argument and decision in the latter case. In *Hargreave's* case (1) the arbitrator had found as a fact that total incapacity had ceased and had terminated compensation. This negatived in fact the kind of incapacity found by the arbitrator in *Ball* v. *William Hunt & Sons* (2) —namely, the inability to obtain work in the labour market owing to an obvious infirmity. On that footing the decision to affirm the award in favour of the employer seems inevitable. The decision is explained in similar terms by the present Lord Chancellor (then Sankey L.J.) in *Stevens* v. *Birmingham Corporation.* (3) I think the case, however, is an authority for the proposition that in an ordinary case if a man loses one eye by accident in the course of his employment and afterwards loses the second eye by a cause unconnected with his employment the arising total blindness is not caused by the accident. Many people have thought this a hard saying, and that the accident would be in such a case at least half

(1) [1912] A. C. 319.

(2) [1912] A. C. 496.

(3) 22 B. W. C. C. 311, 328.

the cause of the blindness. But if this decision fails to give to the workman the full relief which the Act intended him to have, the Legislature alone can correct it; and it must be admitted that in spite of several opportunities there has been no apparent disposition to alter the law as there enunciated. Greer L.J. adopts the attractive view that a distinction should be drawn between a supervenient and an antevenient disability in the uninjured eye: and suggests that an injury to a sound eye when the other eye has incipient cataract should be treated as analogous to an accident to a man suffering from heart disease the full consequences of which must be attributed to the accident. However much one might be disposed to accept this view unfettered by authority, I think that the decision in *Hargreave's* case (1) too definitely dissociates from the results of the accident any infirmity in the uninjured eye to enable one to reconcile the decision with the distinction proposed. For the reasons I have given I think that this appeal should be dismissed with costs.

LORD TOMLIN (read by LORD THANKERTON). My Lords, to my mind the point which falls to be determined in this case is whether or not there was any evidence which could reasonably support the finding of the learned county court judge that the respondent's incapacity for work was no longer total but had become partial.

Admittedly there was no evidence except the offer of January 25, 1930, made by the claims manager of the company with whom the appellants were insured against liability under the Workmen's Compensation Act, 1925.

That offer is found by the learned county court judge to have been made "in all respects in good faith." It is not suggested that that finding ought to be displaced. It is, however, legitimate to inquire what it means. In my judgment it means this, and no more: that if the offer had been accepted the respondent would have been given a job of 3*l*. per week. In fact, when the respondent refused the job the company put into it another workman having a claim to compensation for which the company as insurer was responsible.

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(1) [1912] A. C. 319.

In *Ball* v. *William Hunt & Sons* (1) Lord Loreburn said that there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and that there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch.

On June 14, 1929, 30*s.* per week was awarded to the respondent upon the footing of total incapacity.

How was the insurance company's offer of January 25, 1930, evidence that total incapacity found to exist on June 14, 1929, was reduced to partial incapacity ?

It was an offer by the insurance company liable to the employers to pay to the workman 30*s.* per week under the award then standing. The wages offered were double, or more than double, the wages normally payable for a job of that character. The offer was made to the workman at a time when this insurance company must have known that he could not do the work, and that if he accepted it they could not retain him in the job if they wanted the work done. They had had the report of Mr. Summers early in October, 1929, to the effect that the man would be totally unfit for work in a few months. The learned county court judge appears to accept the view that the claims manager knew of the man's condition when the offer was made, but treats this fact as immaterial, because the state of the right eye was not due to the accident. I cannot regard it as immaterial. The fact that when the offer was made the workman, to the knowledge of the company, was not fit to do the work and that the value of the offer to the company lay not in it being a means to secure the services of the workman, but in the possible use to which it might be put as an instrument for reducing the amount of the workman's compensation, seems to me to deprive the offer of all evidential value upon the question whether the man's total incapacity for work in any

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(1) [1912] A. C. 496, 499, 500.

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market reasonably accessible to him had diminished. If it were otherwise one job of this kind in the office of the insurance company might prove capable of doing for the company yeoman's service by reducing the amounts payable to a long line of workmen in the receipt of compensation.

Even though the offer was made in all respects in good faith in the sense in which I understand the finding of the learned county court judge, it does not in my judgment afford any evidence reasonably capable of supporting the finding that the workman's incapacity for work had diminished.

This is enough to justify the order made by the Court of Appeal and to dispose of the appeal to your Lordships' House.

Having regard, however, to what has been said in the Court of Appeal and to the arguments which have been addressed to your Lordships, I desire to add a few words upon the effect of the two much debated cases of *Hargreave* v. *Haughhead Coal Co.* (1) and *Ball* v. *William Hunt & Sons.* (2)

Decisions upon the interpretation of a complicated statute must for the purpose of determining their true effect and relative values be regarded in the light of their proper chronological setting. For example, the earlier of a series of cases may have been determined before the problems resolved by the later cases have appeared over the horizon.

Of the two cases which I have mentioned the first was argued and determined between the argument and the consideration of the second. The members of your Lordships' House who took part in the second case also took part in the first. The two cases are closely related, and to my mind they present no inconsistency.

In the first case there had been a finding that there was no longer any incapacity for work. That finding could not be interfered with. Upon that finding the decision was based, and it was held that when once incapacity for work had wholly disappeared there could be no place for any subsequent review. This case also, I think, disposed of what may be called the theory of the "stand-by eye." The employer cannot be made responsible for the consequence of the loss of a second eye where there is no causal link between the accident and such loss.

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(1) [1912] A. C. 319.

(2) [1912] A. C. 496.

The second case determines that it is legitimate where the evidence justifies it to find total incapacity for work in the case of a man who, as the result of an accident, has had one eye removed, whether the eye before the accident was useful or useless. Incapacity for work means incapacity to earn wages, and if the noticeable absence of one eye precludes the workman from getting work he is totally incapacitated for work even though he may be physically capable of doing work. So long, however, as any incapacity remains the case is capable of review in the event of any alteration in conditions.

In the light of the conclusions reached in these cases it would not in my judgment be possible here to interfere with the result at which the county court judge arrived except upon the ground that there was no evidence reasonably to support his finding that total incapacity had been reduced to partial incapacity.

I may observe in this connection, but with the greatest respect to the learned Lord Justice who took the contrary view, that the presence of incipient cataract in the right eye at the date of the accident, in the absence of evidence that the accident accentuated or accelerated the progress of the disease, does not in my opinion afford any sound ground for distinguishing this case from those in which the disease in the second eye first began after the accident.

In the result, therefore, the appeal in my opinion fails, though my reasons for that conclusion do not accord with those of the majority of the Court of Appeal.

LORD MACMILLAN (read by LORD THANKERTON). My Lords, to be entitled to compensation under the Act a workman must be totally or partially incapacitated for work as a result of his having suffered personal injury by an accident arising out of and in the course of his employment. It is now accepted that by incapacity for work is meant incapacity to earn wages by working. The personal injury sustained by the workman may incapacitate him from earning wages either by rendering him physically unfit to work or by preventing him from getting work by reason of some handicap which his injury has imposed upon him in the labour market notwithstanding that he is as physically fit for his work as he was before his accident. Although he has completely recovered his physical strength his accident may have left him with some defect which deters employers from engaging him, it may be because it exposes him to greater liability to accident or merely because it renders him less attractive in competition with other candidates for employment.

Either form of incapacity for work entitles the workman to compensation, but it is obvious that the kind of evidence necessary to establish or negative physical ability to work must differ widely from the kind of evidence necessary to establish or negative eligibility for employment. The physical state of a man's body is a matter susceptible of reasonably definite proof, and the degree of his recovery from an accident, whether total or partial, can be determined without much difficulty. The other type of case is less easy of determination, for the employability of a workman physically fit for his work but with a defect resulting from his accident which affects his eligibility is a much more subtle matter to gauge. It may not be so difficult for the workman to establish that he is incapacitated for work by reason of his ineligibility for employment. Sect. 9, sub-s. 4, points the way. If the workman has taken all reasonable steps to obtain employment, but has failed to obtain it, and his failure has been due wholly or mainly to his injury, he makes out his case for compensation and is held to be totally incapacitated, irrespective of his physical ability to do his work. But how is the employer to prove that a workman who has been declared totally incapacitated through ineligibility for employment has recovered his eligibility and so his capacity for work notwithstanding the continued existence of his physical handicap? Of course if the workman succeeds in securing employment once more at his full wages his incapacity through ineligibility is plainly shown to be at an end by the best of evidence. But if the workman remains unemployed how can his incapacity through ineligibility be proved to have ceased? Clearly only by evidence that there is employment available for him notwithstanding his physical defect. The employer may be able to show, for example, that the demand for labour is such that the workman's handicap has become negligible and that employment now awaits him notwithstanding his former ineligibility. Probably the commonest case is where the employer himself offers the workman re-employment at his former or some other suitable work. But where that is not the case, the employer is confronted with a difficult task in adducing the requisite evidence to discharge the burden of proof incumbent upon him. In the present case the employer has attempted this task. It remains to be seen whether he has done so successfully.

I do not repeat the details of the case, which have been fully described by the noble and learned Lords who have preceded me. It is enough for my purpose to state that the respondent, who had lost an eye by an accident which befell him on December 1, 1926, was found in June, 1929, to be physically capable of doing the work which he was doing before the accident but was at the same time found to be totally incapacitated for work by reason of his ineligibility for employment consequent upon the removal of his eye. An award of compensation as for total incapacity was then made in his favour. The appellants, his employers, have applied in the present proceedings to have the compensation ended, and the sole question for your Lordships is whether they have adduced evidence on which it was competent for the arbitrator to find, as he has done, that the respondent's ineligibility for employment has ceased, that his incapacity for work due to that ineligibility no longer exists, and that the award of compensation made in his favour on June 14, 1929, should be terminated.

Now the only evidence adduced before the arbitrator of the respondent's alleged recovery of eligibility for employment was the offer of office-cleaning work made to him by the company with which the appellants are insured and which has been paying him compensation under the existing award. Was the evidence of that offer evidence from which the arbitrator was entitled to infer that the respondent had regained his capacity to earn wages in the sense that he was once more eligible for employment?

My Lords, I am of opinion that the evidence did not warrant the inference which the arbitrator drew from it. The offer has been held to be bona fide, which I take to mean that there really was a job and that if the respondent had taken it he would have been given the work and would have been paid the remuneration offered. But that is not the point. What has to be proved is the respondent's recovered capacity for work, and of this the offer in question is not in my opinion evidence. If a jury had drawn the inference which the arbitrator has drawn I should have held that their verdict could not stand. I have not lost sight of the fact that the reason why the respondent did not or could not take the job offered to him—namely, the increasing blindness of his remaining eye, was one for which the appellants are in no way responsible, and I am far from saying that because a workman has suffered an accident entitling him to compensation his employers are to be made responsible for all subsequent disabilities unconnected with the accident which may overtake the workman from natural causes. It is the character and circumstances of the offer here made to the workman that in my view deprive it of the requisite evidential value. If one swallow is to be allowed to prove the advent of summer, it must be an authentic swallow. The offer of work was made by the insurance company which was liable in the compensation payable to the respondent; it was made to a man who to the company's knowledge was about to become totally blind, although the employers were not responsible for this supervening disability; it was made for the purpose of creating evidence of recovered capacity and not in the ordinary course of business; and the terms offered, though genuine in the sense that the remuneration offered would in fact have been paid if the respondent had taken or had been able to take the job, were not the market value of the services to be rendered but were at least twice as much. To my mind such an offer was not in any sense evidence of recovered eligibility for employment on the part of the respondent. It is an economic not a physical fact that has to be proved. Even the actual obtaining of employment by a handicapped workman may not prove his recovered economic capacity to earn wages, for the job may have been given to him out of philanthropy and be merely nominal. In such a case the compensation is diminished or ended not because the workman is really proved to have recovered his earning capacity but because wages and compensation are mutually exclusive. The philanthropic employer may go out of business and the workman once more find himself unemployed and unemployable owing to his handicap. If he has obtained a declaration of liability I do not see why he should not avail himself of it to claim a renewal of compensation, for the disability due to his accident still persists. But it is not necessary to pursue the refinements of this difficult subject, and I am content to hold that in the present case the offer made to the respondent was not evidence of the economic fact which it was adduced to establish.

I do not find the difficulty which was experienced in the Court of Appeal in reconciling the case of *Hargreave* v. *Haughhead Coal Co.* (1) with the case of *Ball* v. *William Hunt & Sons.* (2) In the former case the arbitrator found not only that the incapacity for work of a workman who had lost an eye had ceased and that he was fit for and had resumed his former work as a miner, but also, what is more to the present purpose, that his wage-earning capacity was not diminished by the loss of his eye. The circumstance that the workman had developed in his other uninjured eye an incipient cataract unassociated with his accident was an irrelevant consideration on the question of the employer's statutory liability for the consequences of the accident. I cannot see how on the findings in that case any Court could do otherwise than hold that the arbitrator had rightly terminated the compensation. On the other hand in *Ball's* case (2)

(1) [1912] A. C. 319.

(2) [1912] A. C. 496.

the workman as a result of his accident had had to have an eye removed; it was a blind eye before the accident but it was still an asset, for it preserved his appearance and saved him from advertising that he was a one-eyed man. After his eye was removed he could not get employment because he was now obviously the possessor of only one eye. The arbitrator found that the accident had resulted in the workman's disfigurement and that he could not get work because of that disfigurement, but nevertheless refused to award compensation. This was manifestly wrong, for on the facts found the workman was suffering from incapacity to earn wages resulting from his accident and was entitled to compensation, and so this House held.

In concurring in the motion that the appeal be dismissed I would only add that, while the rule "stare decisis" is binding on your Lordships, the decisions of this House in progressively construing a statute must often be stepping-stones rather than halting places.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 11, 1931.

Solicitor for the appellants: *Percy W. Cole.*
Solicitors for the respondent: *Silkin & Silkin.*

[PRIVY COUNCIL.]

J. C.
1931
Jan. 26.

UNITED STATES SHIPPING BOARD . APPELLANTS;

AND

THE SHIP ST. ALBANS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Ship—Collision—Locality of Collision—Evidence—Photographs taken from third Ship—Calculation from Photographs—Absence of expert Evidence.

In an action arising out of a collision in Sydney harbour between the ships *Crown City* and *St. Albans,* there were in evidence three photographs, taken from a third moving ship, showing the colliding ships just before, during, and after the collision, with the frontage of the harbour as background. The point in the harbour at which collision occurred was material. The trial judge, basing his judgment solely upon the other evidence in the case, held that the *St. Albans* was to blame. The appellate Court gave the owners of that ship leave to adduce upon an appeal by them the evidence of three land surveyors based upon the photographs. They used the alignment of pairs of objects which they identified in the backgrounds to fix the position of the camera when each photograph was taken, and then by reference to the background localized the collision. These results were shown by a diagram. The appellate Court, accepting the result so arrived at, reversed the decision of the trial judge, stating however that apart from the new evidence they agreed with it.

Held, that the skill or science needed to produce an accurate result by the process adopted was not that of a land surveyor, and that in the absence of expert evidence the reversal of the decision of the trial judge was not warranted.

Judgment of the Supreme Court of New South Wales reversed.

APPEAL (No. 108 of 1929) from a judgment of the Full Court of the Supreme Court of New South Wales (December 17, 1928) reversing a judgment of Street C.J. sitting in Admiralty.

The appeal arose out of a collision in Sydney harbour between the appellants' motor-ship *Crown City* and the respondents' steamship *St. Albans.* Street C.J. found the *St. Albans* to blame. The appellate Court, as the result of new evidence which was admitted, reversed the decision. The new evidence was that of three land surveyors and consisted of calculations by which they purported to localize the collision from three photographs taken from a third moving ship.

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* *Present:* LORD MERRIVALE, LORD ATKIN, and LORD RUSSELL OF KILLOWEN; with nautical assessors.

The facts appear from the judgment of the Judicial Committee.

1930. Oct. 27, 28, 30, 31; Nov. 3, 4, 6, 7. *Dunlop K.C.* and *Stenham* for the appellants.

Norman Raeburn K.C. and *Willmer* for the respondents.

1931. Jan. 26. The judgment of their Lordships was delivered by

Lord Merrivale. The appellants, the United States Shipping Board, are owners of the *Crown City*, a steel screw motor-ship of 5428 tons gross register, and 426 feet in length; which on October 22, 1927, found herself in collision with the defendants' steel single screw steamship *St. Albans*, a vessel of 4119 tons gross register and 367 feet in length, in Sydney harbour near to Bradley Head, where is found the turning point and place of passing of the traffic into and out of the harbour. The *Crown City* was outward bound for Melbourne from Wooloomooloo Bay within the harbour. The *St. Albans* was inward bound from Japan.

In its actual incidents the collision, which took place in broad daylight, was of an ordinary kind involving simple questions to be determined upon the usual conflict of evidence as to the exact place of the casualty and the course and management of the ships. The proceedings in the litigation have been of an unusual kind. Under the provisions of the law locally applicable a Commonwealth court of inquiry was held, presently after the collision, whereat both parties now in litigation were represented by counsel. Following on the inquiry the now appellants brought their action in the Supreme Court of New South Wales (in Admiralty) alleging the respondents by their servants to have been to blame for the collision. After preliminary acts had been filed the parties agreed that the action should be tried on the evidence given at the inquiry. Respondents, however, called at the hearing before the Chief Justice of New South Wales a surveyor to explain certain photographs, hereafter mentioned at length, which had been produced by one of the witnesses at the inquiry. Then the troubles of the parties as to procedure commenced.

Before the appellate Court the respondents obtained leave to call further evidence, and in fact called three land surveyors who gave evidence which they stated to be proof of facts demonstrated by or demonstrable upon the photographs. On the strength of this additional testimony, the finding of the trial judge in favour of the appellants was reversed. What is mainly in question here is the admissibility of this evidence and if it be received, its proper effect in the determination of the question of liability for the collision. The nature of the additional proof received in the appellate Court and its value as evidence raise questions of law and practice of some general importance.

To make the main facts of the collision intelligible the courses of the two ships need to be appreciated.

The usual course of an outward bound vessel, upon rounding Garden Island, which lies eastward of Wooloomooloo Bay, is to get upon a heading of 95°—that is E. 5° S.—and on that course to proceed across the harbour until Bradley Head lighthouse is about abeam, and then under a starboard helm to steam out on a northward and eastward course towards the Sound (by West Channel or East Channel).

On the occasion in question the course of the *Crown City* outward bound from Wooloomooloo Bay and that of the *St. Albans* inward by way of West Channel to Wooloomooloo Bay brought them at about the same time to the immediate vicinity of the head. At the moment of the collision the *Crown City* had not reached her turning point, and on the other hand the *St. Albans*, coming from the West Channel had advanced southward, had had the lighthouse abeam, and had engaged herself in the necessary helm action for making her turn. The *Crown City* had speed of about 8 knots till just before the collision. The speed of the *St. Albans*, for reasons not immediately necessary to be stated, was no more than about 4 knots. The exact course and position of the *Crown City* and the place of collision were in dispute.

The evidence at the public inquiry of witnesses from the *Crown City* and others called on behalf of the now appellants was that the *Crown City* set on her outward course off Garden Island well on the south side of the channel and continued upon a course of 95° and remained on that course until her engines were put full speed astern to avoid collision with the *St. Albans*. That course it was said gave her a heading on which she would have passed with a moderate clearance under the stern of a French vessel the *Commissaire Ramal*, which was at the time moored at a point about S. S. E. from Bradley Head light at a distance from the light of some 1500 feet.

The *Crown City* was in charge of a Sydney harbour pilot who said he took the usual outward course until collision was imminent. The evidence from the ship corroborated this. It was also substantiated by testimony from the captain of the *Commissaire Ramal* and the pilot who was in charge of her, and by two public officers, the signalman at Garden Island and the signal master who was on duty on a signal tower eastward of the harbour. Each of the two last mentioned witnesses described his observation of the collision and stated a line of sight from his own standpoint upon which it occurred. The net effect of the *Crown City's* evidence was to define the place of collision as being upon a line southward of Bradley Head at a distance from the light which could not well be less than 1500 feet.

The officer who was in charge of the *St. Albans* stated that she passed the head at about 300 feet, that when they got abreast of the light the helm was put hard aport and that the vessel was about 300 feet off from Bradley Head at the collision. He said also that the *Commissaire Ramal* was lying not more than 500 feet from the head. The *St. Albans'* captain said that she was abeam of Bradley Head when she took her engine and helm action to avoid collision, and was then 500 feet from the light with about 300 feet of navigable water. Her second officer's evidence was that she passed Bradley Head at 300 feet from the light and thereupon took helm action. The officer in charge and the captain also

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deposed to having observed the *Crown City* on her eastward course at successive points practically in line with the head—the more distant some 2500 feet off and the nearer about 600 feet. They fixed the place of collision southward of the nearer of these points and purported to establish this by evidence of bearings taken—as was said—while the *St. Albans* was still at the place of collision. The point so indicated appears to be something less than 1000 feet in a south-westerly direction from the light.

The three photographs which have been mentioned were produced at the public inquiry by the master of the outward bound steamship *Orungal*, as having been taken by a passenger on his ship when she was proceeding on her course by the West Channel after she had turned under starboard helm off Bradley Head. They show the vessels just before the collision; in collision; and afterwards, when the *Crown City's* stem was some three-fourths of her length eastward from the stem of the *St. Albans*. Each has as background a long stretch of the frontages of the harbour extending along its southern and south-western shores. By questions directed to the nautical witnesses who saw the collision and by evidence of a surveyor it was sought to be shown on behalf of the *St. Albans* that the place of collision could not have been substantially further from Bradley Head than the point deposed to by the master and the other officers of the *St. Albans*. The surveyor by examination of the background of the photographs identified outstanding objects in the background on either hand, and by a process the reverse of that by which nautical bearings are taken, used the alignments of the identified buildings in order to draw transit lines and to ascertain the focal point at which such lines intersect, which point it was said must mark the position of the lens of the photographic camera when the view presented in the photograph was obtained. The surveyor plotted on a chart the position of the *Crown City* so determined, and stated it to be a position in which the bow of the ship was about 950 feet from the Bradley Head light.

Importance was attached at the hearing in the Admiralty Court and in the arguments before their Lordships to evidence given by numerous witnesses at the public inquiry with regard to the course of the *St. Albans* in the five minutes immediately preceding the collision. Off Bradley Head incoming vessels bound for Wooloomooloo Bay must make a turn of five points to come over from the southerly course down the West Channel to their westward course towards the reach between Garden Island and Fort Denison. The *St. Albans*' preliminary act states that her course when the *Crown City* was first seen was S.W. by S. ½ S. What was said generally by the *Crown City's* witnesses was that "she did not make the turn." Captain McCaw of the *Crown City* said she was on a course of about S.S.W. and to all appearances did not alter her course. The *Crown City* pilot said the *St. Albans*' course when sighted was S.W. by S. ¾ S. and at the collision "was not higher than S.W. ½ S. and may be further south than that." The master of the *Commissaire Ramal* "did not think she made any change in her course."

The witnesses for the respondents gave evidence which on the whole was consistent with their preliminary act, where the respondents having stated their vessel's course when the *Crown City* was sighted said that the action taken by the *St. Albans* to avoid the collision was that "the engines of the *St. Albans* were put full speed astern, three short blasts blown, and the helm was put hard-a-port, and the starboard anchor dropped about two minutes before the collision." The master said: "We got abreast of the light and the helm was put hard-a-port. The ship began to swing, but very slightly on account of her going so slow. Then we decided to go full speed astern and let go the starboard anchor." "The whistle was sounded three blasts and her engines put hard astern."

The *St. Albans*' chief officer spoke to the same effect. Her third officer said the ship hauled out when approaching Bradley Head, then the helm was put hard-a-port and her head swung S.S.W. to S.W. He "thought she canted a little to starboard." The vessel's speed was said not to have exceeded 4 knots, and the general impression given by the evidence of those in charge of her was that at that speed she did not come round for her intended westerly course as she was expected to do. The *St. Albans'* helmsman was not called at the inquiry and her engine room entries were not put in evidence.

The learned Chief Justice of New South Wales, before whom the appellants' action was heard in the Admiralty jurisdiction, placed under the inevitable disadvantage of deciding a collision case on a shorthand note of the statements of witnesses he had not seen, with such assistance, if any, as could be derived from the charts, sketches and photographs which were put in, came to the conclusion that the story of the plaintiffs' witnesses was the more trustworthy, and was inherently more probable than that of those from the *St. Albans*. "I find it quite impossible," the learned judge said, "to accept the story these latter tell." Assuming their place of collision even to be approximately correct, the learned judge could not see why if the *St. Albans* was under control and was being efficiently navigated, there should have been any collision. But he found as a fact, on the evidence of the *Crown City's* officers and the independent witnesses, that the collision took place something like 1600 feet to the south of Bradley Head.

The photographs taken on board the steamship *Orungal* were considered by the Chief Justice in the light of conflicting evidence given by witnesses as to the inferences to be drawn from them, and he found himself unable to form a trustworthy judgment upon their contents and bound to deal with the case on the evidence of the eye-witnesses. The learned Chief Justice held further that if the *Crown City* had been as near as 1000 feet to the head there should still have been room enough for the *St. Albans* to pass her in safety upon her proper side. "I think, therefore," the learned Chief Justice concluded, "that for some unexplained reason the *St. Albans* kept too far to the southward before porting her helm to proceed up the harbour, and that she is to blame."

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Arguments, which had been raised on the footing that the *Crown City* failed to keep to her starboard hand in a narrow channel, and again on the footing that the ships were crossing ships and that the duty of the *St. Albans* in that position was to keep out of the way of the *Crown City* and that of the latter vessel to keep her course and speed, were duly considered.

Very naturally, as it seems to their Lordships, the learned Chief Justice found himself in difficulties as to defining the limits of the narrow channel, to which in this case art. 25 of the regulations for preventing collisions at sea would be applied, and declared himself unable to find that the *Crown City* was in fault under this head. He also held in favour of the *Crown City* that the *St. Albans* was under a duty by virtue of art. 19 of the regulations to keep clear of the *Crown City*, as that vessel had been on the *St. Albans*' starboard hand, and under art. 21 that the duty of the *Crown City* in the circumstances was to keep her course and speed.

On the appeal of the now respondents to the Full Court, application was made by them for leave to adduce new evidence—that, namely, of surveyors—to prove what conclusions ought to be drawn from the photographs which had been put in evidence. The application was strenuously opposed, but upon the opinion of the majority of the learned judges was allowed, and the evidence was in due course received. In view of the agreement of the parties as to the evidence to be received at the hearing of the action, this reception of evidence was made a ground of appeal to His Majesty in Council by the appellants. An interesting question of the operation of the relevant statute was thereby raised. As to this, however, no more need now be said, since the appellants did not eventually press the objection before their Lordships.

The evidence of the surveyors who were called by the respondents to apply in the case facts which they declared to be established by scientific use of the photographs in question was subjected before the Full Court to close cross-examination, but the appellants did not call surveyors or other scientific experts. They insisted that the propositions of fact asserted against them could not be sustained on the material before the Court.

The evidence admitted in manner stated was for all practical purposes embodied in a diagram which purported to lay down the focal points at which the three photographs respectively were taken, and by reference to the backgrounds to extend to points thereon radial lines within which, as it was said, the vessels lay at the material times. Given the distance from the shore of each focal point and the angle of convergence thereon of the radial lines the situation of each ship could, it was contended, be geometrically determined with practical certainty. Proceeding on this footing the surveyors testified that the place of collision was virtually that alleged on the part of the *St. Albans*, and not more than 950 feet from the shore.

The three learned judges in the Full Court found the diagram produced as before mentioned to be a true presentment of the material facts as to the positions of the *Crown City* and the *St. Albans* at the material times. These the Court held to be the facts demonstrated by the photographs. Acting upon this view the learned judges rejected the evidence of the eye-witnesses on which the learned Chief Justice had arrived at his decision and gave judgment for the now respondents. " I have no hesitation," the acting Chief Justice said, " in discarding at once any oral evidence from either side so far as it is inconsistent with the facts disclosed by the photographs." Campbell J. said : " I see no reason for refusing to accept the evidence of the witnesses . . . . called for the defendants on the hearing of the appeal. . . . . I accept their evidence, and I look at the photographs in the light of it." Davidson J. agreed.

The learned judges were also agreed in considering that upon the evidence given at the public inquiry the findings of the trial judge in favour of the *Crown City* were unimpeachable, if not inevitable. " I should have been unable," Campbell J. said, " to come to any other conclusion."

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The judgments in the Full Court do not deal specifically with the question whether, assuming the place of collision deposed to by the surveyors, the *St. Albans* ought to be held to blame for the collision. The learned Chief Justice was of opinion that she ought.

The reasoning on which the professional witnesses in the appellate Court based their conclusions proceeds in this manner: On the photographs in question certain pairs of buildings and objects are seen to be more or less directly in line upon the same perpendicular plane: these same buildings and objects must lie horizontally in a more or less direct line from the lens in which the photograph picture was received; the point of intersection of converging lines extended horizontally through the respective pairs of buildings and objects will show what was the point at which the camera was used. The measurements taken by the surveyors were not challenged, nor was their good faith. What was in dispute was whether the premises assumed or obtained could warrant their conclusions of fact. Underlying the matter last mentioned is the inquiry whether there was before the Full Court evidence of fact upon which the findings of the Court of first instance could be, or ought to be, displaced.

The evidence in question, its admissibility and its juristic effect, were subjects of close and prolonged examination in the arguments addressed to their Lordships on the hearing of the present appeal. Counsel reasoned the matter on general principles, and it is useful under the circumstances to see what are the rules which on general principles are applicable to the case.

The use in evidence of photographic pictures and the limits within which they are judicially receivable by way of proof of matters of fact has often come under consideration before English Courts. For instance, in a case of *Reg.* v. *United Kingdom Electric Telegraph Co.* (1), in 1862, Martin B., after argument, received as evidence photographic views showing the configuration and general nature of the surface of a highway, where the matter in question was nuisance

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(1) (1862) 3 F. & F. 73.

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by an alleged obstruction, and in a more modern case, in the appellate Court, in *Hindson* v. *Ashby* (1), A. L. Smith L.J. and other Lords Justices demonstrated the necessity for careful delimitation of the uses for which, upon mere production of them, photographs can be accepted as means of proof of matters of fact. Clearly a photographic picture cannot be relied upon as proof in itself of the dimensions of the depicted object or objects, and cannot be made properly available to establish the relative proportions of such objects except by evidence of personal knowledge or scientific experience to demonstrate accurately the facts sought to be established.

The question of the evidential value of the testimony of the three expert witnesses for the defendants depends in like manner upon ascertained limitations which define the power of judges to accept opinions of witnesses as proof of matters of fact.

The extent to which the opinions or conclusions of skilled persons are receivable by way of proof in point of fact has not been seriously in doubt from the time when, in 1782, in *Folkes* v. *Chadd* (2), Lord Mansfield stated the grounds on which the evidence of Smeaton, the famous constructive engineer, was to be admitted upon a disputed question of obstruction to a harbour: "the opinion of scientific men upon proven facts may be given by men of science within their own science." Another Chief Justice, Lord Russell of Killowen, explained the rule in a modern case of *Reg.* v. *Silverlock.* (3) The witness must have made a special study of the subject or acquired a special experience therein. "The question is," Lord Russell said, "is he peritus; is he skilled; has he an adequate knowledge?"

Some of the scientific topics involved in the contest here were discussed by counsel in course of prolonged argument as to proofs afforded by the photographs, on the footing that judicial notice is taken of matters which are of common knowledge. Among these were subjects such as these: the difference of scale in the picture obtainable by a single lens of objects in the direct line of view and objects in the margins of the field; the effect in photography of the extent of the focal angle; the results due to development on a plane surface of pictures obtained in photographic perspective; the means of neutralizing the effect of the curve of the field of the lens. Counsel purported to discuss the topics in question in the light of personal experience, as matters of common knowledge.

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(1) [1896] 2 Ch. 1, 25, 27.
(2) (1782) 3 Dougl. 157.
(3) [1894] 2 Q. B. 766, 771.

What are the limits within which matters such as those here mentioned are within judicial cognizance is not necessary now to be determined. Evidence of the sources of common knowledge, if not of its extent, may perhaps be obtained by reference to a cyclopædia and the lists of text-books there to be found. Detailed information supplied from such sources requires usually to be established by experts.

That the extent to which and the processes by which an accurate topographic plan can be produced from a pictorial delineation of a scene are matters of common knowledge could hardly be said, though such questions have long occupied the attention of men of science. A well known member of the bar, who is also a distinguished student of applied mathematical science, has traced in a recent work (Generalised Linear Perspective with Special Reference to Photographic Land Surveying, by J. W. Gordon, K.C., London, 1922) the development of knowledge in relation to the subject since the time when an eighteenth century mathematician dealt with it in a treatise on generalized perspective. Two pre-requisites for the conversion of a photographed picture of a landscape into a map or plan—after ascertainment of the viewpoint of the photographer—are said to be proof that the lens used had been accurately corrected to yield what is known as a flat field and knowledge of the angle to the horizontal plane at which the camera was held.

Reference is made here to the scientific problems which have just been indicated not by way of preface to any judicial conclusion as to the true value of the photographs in question as the basis for geometric surveys of the scenes they present, but to emphasize two manifest propositions, one that the skill or science called for by the task mentioned is not that of the land surveyor and the other that there was not before the appellate Court the evidence of any witness skilled and experienced in the discharge of such a task. What follows in their Lordships' view upon the examination which has now been made of the new evidence received in the appellate Court is that standing alone it does not warrant departure from the judgment of the Court of first instance, which, without new evidence, was admitted to be unimpeachable.

The judgment of the learned Chief Justice, moreover, as has already been mentioned, proceeded upon two grounds: first, acceptance of the *Crown City's* place of collision, and, secondly, consideration of the questions of nautical skill which arise if the *St. Albans'* place of collision be assumed.

Their Lordships had the advantage at the hearing of the assistance of nautical assessors to whom they submitted a series of questions bearing immediately on the case made for the *St. Albans*.

As to the point of time, and the place at which on her course, as stated on her behalf, the *St. Albans* could properly take helm action, engine action, or both, the view stated by the assessors was that the *St. Albans* ought not to approach the light and head nearer than 500 feet, and that she would be in a position to port her helm for rounding the head when the lighthouse was on a bearing of 276° and at the distance of about 580 feet shown in the line of her course marked on one of the plans put in evidence, but that this is a position nearer the shoal water than should be taken except to avoid collision.

As to the narrowest breadth of water-way in which the *St. Albans*, in good order and properly navigated, could certainly be able to make her turning movement so as to round Bradley Head in safety and proceed on her new course westward, the assessors stated it at 250 feet, but added that with the *Crown City* in view and Bradley Head to be rounded, to round within this distance of the *Crown City* would involve considerable risk to both vessels.

Having regard to the accepted position of the *Crown City* in relation to the *Orungal* and the point northward of Bradley Head at which the *St. Albans* declaredly passed the *Orungal* the assessors were asked whether the St. Albans would be hindered or embarrassed in shaping to pass on and keep clear of the *Crown City* if the *Orungal's* distance from the light when abeam of the light was 1100 feet or 1200 feet. They replied that under these conditions the *St. Albans* should not have been hindered or embarrassed.

The assessors were asked further: assuming the place of collision alleged by the *St. Albans* and the *Crown City* on the course of 95° which brought her to that point, could the *St. Albans* by reasonable care have avoided collision? They replied that from a seaman's point of view the *St. Albans* on that assumption had a somewhat difficult problem, considering that her speed was only about 4 knots and her turning power therefore very slow. They amplified their answer thus: She had two alternatives (*a*) to go full speed ahead in hopes she could turn sufficiently fast to clear the *Crown City*; and give one short blast; (*b*) to go full speed astern and let go anchor; this she did; but not soon enough. She veered her cable to 30 fathoms. Had she checked it at 15 or 20 fathoms it might have brought her up just in time to avoid collision. Reasonable care was taken, but just too late.

The last of these answers throws light on a striking part of the evidence in the case, that, namely, which suggests that the *St. Albans* both failed to make her turn and failed to bring up, as promptly as those in charge of her expected. The real cause of the collision seems to be probably found in this failure.

As far as the relative situations of the vessels at material points of time are concerned their Lordships, accepting as they do the advice of the nautical assessors, are satisfied that the collision was due not to the *St. Albans* being kept by the *Crown City* so close to the shore that she had not room to make her turning movement in safety, clear of the *Crown*

City, but to her failure from causes incidental to her own navigation both to make the turn and keep clear of the *Crown City*.

The questions which were raised between the parties, as to the effect of the various regulations for preventing collisions at sea, which control navigation of vessels passing in a narrow channel and decide as between approaching vessels which is the "give way" ship, depend upon conclusions of fact as to the extent and bounds of the narrow channel to which the relevant regulation is to be applied and as to the relative movements of the *Crown City* and the *St. Albans*, before the collision, which, in view of the conclusions already stated, would not usefully be examined in the present case.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Chief Justice restored, and that the respondents should pay the appellants' costs here and below.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondent: *William A. Crump & Son.*

[PRIVY COUNCIL.]

J. C.*
1931
Feb. 24.

M. GOONEWARDENE . . . . APPELLANT;

AND

E. M. GOONEWARDENE AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Will—Codicil confirming Will—Effect on Dispositions in Will—Wills (Landed Property) Ordinance (No. 21 of 1844, Ceylon), s. 5.

By s. 5 of Ordinance No. 21 of 1844, of Ceylon, as by s. 34 of the (English) Wills Act, 1837, the effect of confirming a will by a codicil of later date is to make a disposition in the will operate in the same way as it would have operated if the words of the will had been contained in the codicil.

Judgment of the Supreme Court of Ceylon affirmed.

APPEAL (No. 139 of 1929) from a decree of the Supreme Court of Ceylon (July 30, 1929) affirming an order of the District Court of Galle.

The appeal related to the construction and effect of the will dated August 7, 1913, of D. G. Goonewardene, a resident in Ceylon who died on August 22, 1927, and of a codicil dated August 9, 1927, by which the will was confirmed.

The sole question arising was whether the Courts in Ceylon were right in holding that having regard to s. 5 of Ord. 21 of 1844 the effect of the codicil was to make dispositions in the will in favour of the testator's wife (the appellant) operate as though the words of the will had been contained in the codicil.

The terms of the section and the provisions of the will and codicil appear from the judgment of the Judicial Committee.

1931. Feb. 3. *De Gruyther K.C.* and *H. I. P. Hallett* for the appellant. *In re Reeves* (1), and cases there cited, held that under s. 34 of the (English) Wills Act, 1837, the effect of confirming a will by a codicil was to make a disposition in the will operate as if the words of the will had been contained in the codicil. But to construe s. 5 of Ord. 21 of 1844 as embodying that principle is to disregard the words "for the purpose of this Ordinance." The purpose of the Ordinance appears from the preamble and s. 1; it was to enable persons to dispose by will of their property free from claims which various relatives might have under any law, usage, or custom in force in the colony. For instance, the distribution of the estate of a deceased Mahomedan was so governed. The effect of s. 5 was merely that by a republication after the Ordinance of a will made before it a testator could obtain for the will the effect given by the Ordinance. The common law of Ceylon relating to testamentary dispositions was first affected by Ord. 7 of 1840, which incorporated certain provisions of the (English) Wills Act, 1837, but which did not incorporate the rule laid down by s. 24, that a will speaks from death, nor s. 34.

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* *Present:* LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, and SIR LANCELOT SANDERSON.

(1) [1928] Ch. 351.

Dunne K.C. and *Colombos* for the respondents Nos. 1, 2 and 3 were not called upon.

Feb. 24. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. The point for decision upon this appeal arises in the following circumstances.

A testator made his will on August 7, 1913. It contained a disposition (hereinafter called the settled legacy) in the following words: "I give and bequeath to my said wife all the moneys now invested by me on Mortgage bonds or promissory notes and all cash in deposit to my credit in my No. 2 account in the Mercantile Bank of India, Ltd., Galle, subject to the direction that she is to have the interest derived therefrom up to the time of her death or remarriage as aforesaid. Thereafter the same shall vest absolutely in my said three nieces."

He then made various bequests, including one which ran thus: "(*g*) the rest and residue of my cash found in my possession at the time of my demise and also the money in deposit to my credit in my No. 1 account in the Mercantile Bank of India, Ltd., Galle, in the Bank of Madras, Colombo, in the Government savings bank and in the Post Office savings bank and the amount of my policy of insurance together with the profit thereof and all other movable property absolutely to my said wife Margaret."

He made a codicil dated August 9, 1927, which he declared to be " a codicil to the last will and testament made by me and dated August 7, 1913." It gave a pecuniary legacy to a servant, and disposed of a certain house; and it contained these words—" Save as hereby altered or modified I hereby confirm the said will."

The testator died on August 22, 1927, and the will and codicil were duly admitted to probate.

At the date of the will the testator was entitled to moneys invested on mortgage bonds or promissory notes to an amount of some Rs.39,000. These debts had all been repaid long before the date of the codicil. At the latter date, the testator was entitled to moneys invested on mortgage bonds or promissory notes to an amount of Rs.214,200, all of which represented loans made by the testator since the date of his will.

Further, at the date of the will the cash in deposit to the testator's credit in his No. 2 account in the Mercantile Bank was Rs.1250. At the date of his death, as also at the date of the codicil, it was Rs.6920.

The question arose whether the Rs.214,200 passed under the bequest of the settled legacy, or under the gift of " all other movable property " contained in clause (*g*). If under the latter, the widow would take absolutely; if under the former, she would only be entitled to a life interest determinable on remarriage. A similar question arose in regard to the said sum of Rs.6920.

The District Judge of Galle was of opinion that the republication of the will by the codicil brought the date of the will down to the date of the codicil, and that the words of the will must be interpreted as if they had been written in 1927. He accordingly decided that " the testator's nieces are entitled to a reversion of the moneys invested on bonds and notes on the date of the codicil, and to the cash in deposit under account No. 2 in the Mercantile Bank." Their Lordships have not seen any copy of the formal order of the District Judge, but they interpret his judgment as being a decision that the items of property in question passed under the bequest of the settled legacy and not under clause (*g*).

On appeal to the Supreme Court of the Island of Ceylon, the order of the District Court was affirmed. The question is whether these decisions are correct.

It is well settled in England that, by virtue of s. 34 of the (English) Wills Act, the effect of confirming a will by codicil is to bring the will down to the date of the codicil, and to effect the same disposition of the testator's property as would have been effected if the testator had at the date of the codicil made a new will containing the same dispositions as in the original will but with the alterations introduced by the codicil. In the language used by North J. in his judgment in *In re Champion* (1), the effect is to make a devise in the will "operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date."

The learned judges in the Courts below have held that the law which obtains in Ceylon in this respect is the same as the English law, and this, by reason of the provisions contained in Ordinance No. 21 of 1844.

With this view their Lordships agree. Sect. 5 of the said Ordinance runs thus: "Every will re-executed or republished or revived by any codicil shall for the purpose of this Ordinance be deemed to have been made at the time at which the same shall be so re-executed or republished or revived." The earlier printed versions of this Ordinance contained the word "purposes" and not "purpose," but, in view of the definition section contained in the Ordinance, it is unnecessary to consider which is the correct version.

It was suggested that the words "for the purpose of this Ordinance" limited the application of the section in such a way as to cause it not to operate in regard to the present case.

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(1) [1893] 1 Ch. 101.

Their Lordships are unable to accede to that suggestion. The section appears to them to be framed upon the exact lines of s. 34 of the Wills Act; and they agree with the District Judge in the reasons given by him for the view that s. 5 of the Ordinance applied.

The result is that the bequest of the settled legacy includes the moneys which on August 9, 1927, stood invested by the testator on mortgage bonds or promissory notes, and also all cash which on the same date stood on deposit to his credit in the particular account. Their Lordships express no opinion in regard to other points of law, which were dealt with in the judgments of the Supreme Court.

Their Lordships will humbly advise His Majesty that this appeal, with the petition for the admission of a further document, should be dismissed with costs.

Solicitor for appellant: *O. A. Cayley.*

Solicitor for respondents Nos. 1, 2, and 3: *H. S. L. Polak.*

[PRIVY COUNCIL.]

J. C.*
1931
Feb. 27.

COMMISSIONER FOR LOCAL GOVERNMENT LANDS AND SETTLEMENT . } APPELLANT ;

AND

KADERBHAI . . . . RESPONDENT.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE COURT OF APPEAL FOR EAST AFRICA.

Kenya—Crown Lands—Sale of Town Plots—Conditions of Sale—Racial Restriction—Crown Lands Ordinance (Laws of Kenya, 1926, *c.* 140), *ss.* 15, 18—*Mandamus—Precision of Order necessary.*

When the Commissioner of Lands, appointed under the Crown Lands Ordinance of Kenya, is selling town plots by auction under ss. 15 and 18 of the Ordinance he can impose either or both the conditions (1.) that Europeans only shall bid or purchase, (2.) that the purchaser shall not permit the dwelling-house or outbuildings which are to be erected to be used as a place of residence for any Asiatic or African who is not a domestic servant employed by him.

Upon an application for a high prerogative writ, such as a writ of mandamus, it is important that the proper practice should be followed, and that the precise order asked for and made should be carefully defined.

Decree of the Court of Appeal for East Africa reversed as to the inclusion of condition (1.).

CONSOLIDATED APPEAL and CROSS-APPEAL (No. 8 of 1930) from a decree of the Court of Appeal for East Africa (July 6, 1929) reversing a decree of the Supreme Court of Kenya, sitting at Mombasa (December 10, 1928).

The appeal arose out of a motion by the above mentioned Kaderbhai, a British Indian subject of the Crown, for a writ of mandamus. He contended that the Commissioner of Lands appointed under s. 8 of the Crown Lands Ordinance, 1915 (now c. 140 of the Laws of Kenya, 1926), in selling town plots by auction under ss. 15 and 18 of the Ordinance had no power to impose either of the conditions: (1.) that Europeans only should bid or purchase; (2.) that the purchaser should not permit the dwelling-house or outbuildings which were to be erected to be used as a place of residence for any Asiatic or African who was not a domestic servant employed by him.

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* *Present:* LORD BLANESBURGH, LORD ATKIN, and SIR LANCELOT SANDERSON.

The trial judge dismissed the application. An appeal was allowed in so far as it was claimed that Kaderbhai should be allowed to bid and purchase the plots in auction, but otherwise the appeal was dismissed.

The material facts and the terms of the Ordinance appear from the judgment of the Judicial Committee.

1931. Feb. 3. *Sir Stafford Cripps S.-G.* and *Lavington* for the Commissioner.

Sir Thomas Inskip K.C. and *Colombos* for Kaderbhai.

Feb. 27. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from an order of the Court of Appeal for Eastern Africa, varying an order of the Supreme Court of Kenya, which dismissed a motion by the applicant Abdulhusein Kaderbhai for a mandamus addressed to the appellant, the Commissioner for Local Government Lands and Settlement in Kenya.

The Commissioner had given notice of an auction sale of town plots at Mombasa at which Europeans only were to be allowed to bid and purchase. The notice contained the further special condition that during the term of the grant the grantee should not permit the dwelling-house or outbuildings which had to be erected upon it to be used as a place of residence for any Asiatic or African not a domestic servant employed by him. The applicant, who is an Indian subject of His Majesty resident in Mombasa, on August 10, 1928, by notice of motion dated August 9, moved the Court for a mandamus commanding the Commissioner to allow the applicant to bid for and purchase at the auction sale of the plots on Mombasa Island, notified to be held on August 11, and also commanding the respondent to cancel or annul the condition No. 5 of the special conditions, being the condition above referred to, restricting the use of the dwelling-house.

The learned judge before whom the application came ex parte made an order postponing the sale, and ordered that "a notice to show cause do issue to the respondent upon the above mentioned motion for a mandamus" returnable in a month. Eventually, in December, counsel for the applicant and the Commissioner were heard on that order, and the learned judge dismissed the motion. On appeal to the Court of Appeal for East Africa the Court allowed the appeal as to the right to bid and purchase, but dismissed it as to the restrictive condition. The decree reads: "It is ordered that the appeal be allowed . . . . to the extent that the rule in regard to the first prayer is made absolute—viz., the appellant is allowed to bid for and purchase certain Crown land proposed to be sold by auction in Mombasa Island." No objection appears to have been taken at any time to the form of the proceedings, counsel for the Commissioner in the Supreme Court stating that he was instructed not to take any technical points, but to argue the case on its merits. Their Lordships will proceed therefore to dispose of the legal question involved, and will reserve any comments on the procedure.

The disposal of Crown lands in Kenya is regulated by the Crown Lands Ordinance, No. 12 of 1915. The case made by the applicant is that under the provisions of the ordinance the Commissioner is bound to permit all members of the public or, alternatively, all subjects of the Crown to bid and purchase at an auction of town plots, and is equally bound not to insert in the lease of any such plots restrictive conditions adversely affecting the Asiatic or African population of Kenya, at any rate, to such an extent as to make a purchase by them of no practical value. The case of the Commissioner is that the terms of the ordinance do not prevent him from imposing the restrictions of which complaint is made. It is desirable to point out that the Courts are concerned only with the bare question of law—namely, the powers of the Commissioner under the ordinance. Questions of policy, or, in other words, how the legal powers shall be exercised, are not matters for the legal tribunal, but have to be determined by the appropriate constitutional authority. Approaching thus the construction of the ordinance it is found that it is divided into twelve parts. Those with which this controversy is concerned are Part II., Administration; Part III., Disposal of land within townships; Part IV., Disposal of agricultural land. By s. 6, the first section falling under Part II., the Governor is given power to grant lease or otherwise alienate on His Majesty's behalf, any Crown lands for any purpose and on any terms and conditions as he may think fit. He is, further, given power to remit covenants and conditions, extend the time for performing conditions and accept the surrender of any lease or licence.

By s. 8 the Governor is to appoint a Commissioner of Lands "who shall have charge of the administration of this ordinance." Sect. 10 confers on the Commissioner power to do any acts which may be done by the Governor; but as it contains a proviso excluding from the operation of the section the powers conferred (inter alia) by s. 6, we must look elsewhere for powers given to the Commissioner to dispose of any Crown lands. These are to be found in Parts III. and IV. Part III. is headed Disposal of land within township (1.) offering of town plots:—

"15. The Commissioner of Lands may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the manner hereinafter prescribed.

16. Leases of town plots may be granted for any term not exceeding ninety-nine years.

17. Before any town plot is disposed of under the next succeeding section the Commissioner of Lands shall determine: (*a*) The rent which shall be payable in respect of such plot; (*b*) the upset price at which the lease of such plot will be sold; (*c*) the building conditions to be inserted in the lease of the plot; and (*d*) the special covenants, if any, which shall be inserted in the lease.

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18. Leases of town plots shall, unless the Governor shall otherwise order, in any particular case or cases, be sold by auction.

19. The place and time of sale shall be notified in the *Gazette* not less than four weeks or more than three months prior to the day of sale, and the notice shall state: (*a*) The number of plots and the situation and area of each plot; (*b*) the upset price at which the lease of each plot will be sold; (*c*) the amount of survey fees and the cost of the deeds for each plot; (*d*) the term of the lease and the rent payable in respect of each plot; and (*e*) the building conditions and the special covenants, if any, to be inserted in the lease to be granted in respect of any plot:

Provided, however, that the lease of any plot may be withdrawn from sale by the Commissioner of Lands at any time prior to the same being offered for sale.

20. The auctioneer shall, before the commencement of the sale, read the terms and conditions of the sale, and all persons bidding at the sale shall be bound by the terms and conditions so read."

With these provisions it is necessary to compare the corresponding sections of Part IV., Disposal of agricultural land (1.) Offering of land for agricultural purposes:—

"25. The Commissioner of Lands may cause land available for leasing for agricultural purposes to be surveyed and divided into farms which shall not, except with the consent of the Governor, exceed five thousand acres, or except with the consent of the Secretary of State, exceed seven thousand five hundred acres.

26. Leases of farms shall, unless the Governor shall otherwise order in any particular case or cases, be sold by auction.

27. When land available for leasing for agricultural purposes shall have been surveyed and divided into farms and it is proposed that leases thereof shall be sold by auction, the Commissioner of Lands shall give notice in the *Gazette* of the place and time which shall not be within three months of the date of the publication of such notice at which leases in respect of such farms will be offered for sale by auction.

Such notice shall state: (*a*) The situation of the farms and the approximate area of each farm and the time when and place where the plan of each farm may be seen; (*b*) the upset price at which the lease of each farm will be sold; (*c*) whether persons other than Europeans will be permitted to bid for the lease of the farms; (*d*) any special covenant or condition to be inserted in any lease to be granted; (*e*) the annual rent to be paid for each farm for the first period of the lease, as hereinafter defined; and (*f*) the survey fees and the cost of the deeds to be paid in respect of each farm:

Provided, however, that the Commissioner of Lands may withdraw any lease from sale at any time before the same is offered for sale.

(4) COVENANT AS TO OCCUPATION.

39. There shall by virtue of this ordinance be implied in every lease granted under this part to a European a covenant that he shall not without the consent of the Governor in Council appoint or allow a non-European to be manager or otherwise to occupy or be in control of the land leased."

The contention of the applicant which has found favour with the Court of Appeal is that the provision in s. 18 that leases of town plots shall be sold by auction involves that, in the absence of express and unequivocal words, the sale cannot be restricted to a particular section of the community. Sheridan A.C.J. thought that the ordinance itself indicated that no restriction was to be placed on the bidding. He referred to the absence in s. 19 of any requirement that notice should be given of such a restriction as compared with s. 27 (*c*) relating to the notice in sales of agricultural land, and attached importance to the words of s. 20: "all persons bidding at the sale." Guthrie-Smith A.C.J. thought that the Commissioner would be violating his duty as a trustee for the Government by restricting the class of purchasers. He thought that such a limitation tended to reduce the price, since it cut out a class of potential bidders. Muir Mackenzie J. considered that on a comparison of the sections regulating the sale of town plots with the sections regulating the sales of agricultural land, as there was a mandatory provision in s. 27 (*c*), that the Commissioner should state whether persons other than Europeans will be allowed to bid and no such provision in s. 17, it must be taken that express power to restrict was given as to agricultural land and was not given as to town plots.

After careful consideration of the judgments in the Court of Appeal their Lordships find themselves unable to agree with the decision. Prima facie the Crown and the servants of the Crown, exercising the right of disposing of Crown property, have at least the rights of private owners of making the disposition in any way that appears to them to be best in the interests of the Crown. The servants of the Crown, if given disposing power by statute, must comply with the terms of the statute, but within those terms their duty is to act honestly in what they conceive to be the ultimate interests of the Crown or of the public. In such disposition, unless it is expressly given by statute, there does not exist, and never has existed, any legal right of any particular member of the public to take part. Sales or leases, if permitted to be by private treaty, are regulated by the duty which the servant of the Crown owes to his superior, but owes to no individual member of the public. If the statutory duty of the Crown servant is to sell by auction, that duty must, no doubt, be observed. Their Lordships would agree that such a duty imposed by statute would ordinarily involve a duty to sell by public auction; but if there is no further express provision there would seem to be no reason for further limiting the discretion of the officer as to the terms and conditions of the public auction which he shall decide to hold. If there can be restriction of user there seems no objection to limiting the bidders to those capable of the restricted user. If plots are reserved for dwellings for the industrial classes, it might well be expedient to restrict bidding to members of that class. In the very case in question bidding is to be limited, apparently without objection, to persons who have not already purchased a plot, and if to them why not, if thought desirable, to persons who had not already purchased a similar plot at a previous sale ? Township plots include land for commercial purposes, and there would appear to be no reason why in appropriate cases the user should not be restricted to the building of wharves, warehouses or factories, or why the bidding should not reasonably be restricted to approved intending wharfingers, warehousemen or factory owners. If the words, "sell by auction," therefore, stood alone, there seems to their Lordships no reason why there should not be imposed a restriction as to the bidders. If any restriction be allowed the question whether the restriction should be based on racial distinctions is obviously not one of law, but of policy. Their Lordships cannot entertain the view that to restrict bidding is necessarily to sell at a disadvantage. In respect of residential plots in particular the very opposite result may be attained.

But in the present case the words of the ordinance construed as a whole appear to indicate that the words "sell by auction" in s. 18 are not confined to selling without restriction, but do involve the power to sell by restricted auction. Their Lordships' examination of the clause relating to the sale of agricultural land leads them to the opposite inference to that formed on the same clauses by the Court of Appeal. The only disposing power given under either part is by ss. 18 and 26. The leases are to be sold by auction. The empowering words are identical. Prima facie, they should convey the same power. But the nature of the power in respect of agricultural lands can be discovered from the provisions of s. 27 as to notice, and from s. 27 (*c*) it is obvious that the Legislature contemplated that in the sale of which notice must be given, there was to be a power of restriction. If therefore power to sell by auction in s. 26 gives a power of restricted auction what reason is there for assuming that the same words in s. 18 give a different power ? With great respect to those who have expressed a contrary opinion, the fallacy is in assuming that a clause as to notice has anything to do with granting or limiting a power of disposition which has to be found independently. The value of the notice clause is to call attention to the powers which are assumed to be given, and which can only be given, in the identical terms of ss. 18 and 26.

The absence of the statutory necessity of notice of restriction on the sale of town plots seems to their Lordships to be without special significance. It is easy to conceive reasons why the Legislature made special provision for notice of an extension of the sale to non-Europeans in the case of agricultural land while omitting statutory provisions on the subject in the township areas. In the latter case notice as to the persons whose biddings would be accepted, might well be left, as in the former case it probably could safely have been left, to the discretion of a competent administrator of an auction sale. It is difficult to see how notice of a restriction could, in any case, be omitted.

If, as their Lordships have indicated, the Commissioner had the power to impose the general restriction as to bidding, it was not contended by counsel for the applicant that objection could be made to the restrictive condition as to user. Their Lordships entertain no doubt that the objection on this head fails.

It is not proper to part from the case without calling attention to the procedure in this case, which it is not desirable should form a precedent. In respect of this sale fixed for a Saturday, August 11, by a notice of July 3, the applicant, by a notice of motion dated on Thursday, moved the Court on Friday for a mandamus to the Commissioner. The necessary evidence of a demand and refusal was extraordinarily weak. The Court appears to have postponed the sale by an order made ex parte, a proceeding which nothing but extreme urgency would justify. The writ of mandamus, which is a high prerogative writ, is of the greatest value in maintaining the law, but it is discretionary, and the granting of a rule in the circumstances seems to have conceded the applicant more than he was entitled to. The precise order asked for and made should in such cases be carefully defined. Their Lordships would have found it difficult to support an order which apparently commanded the Commissioner to allow the applicant to bid at a sale which had only been advertised subject to certain conditions. It would be wrong to prevent the Commissioner from withdrawing the sale altogether if he thought that it was inexpedient to sell at present without such conditions. Their Lordships have been able to decide the point of law which concerned the litigants without paying special attention to forms; but they must not be taken to approve the present proceedings as a precedent in any future attempt to decide similar questions.

For the reasons they have given they will humbly advise His Majesty that the appeal of the Commissioner be allowed and the order of the Court of Appeal, dated July 6, 1929, be set aside, and the order of the Supreme Court of Kenya, dated December 10, 1928, be restored, and that the cross-appeal of the applicant be dismissed. The applicant must pay the costs here and in the Court of Appeal.

Solicitors for Commissioner: *Burchells.*
Solicitor for Kaderbhai: *H. S. L. Polak.*

[PRIVY COUNCIL.]

J. C.*
1931
March 24.

ESHUGBAYI ELEKO . . . . APPELLANT;

AND

OFFICER ADMINISTERING THE GOVERNMENT OF NIGERIA AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NIGERIA.

Nigeria—Powers of Governor—Deposed Chief—Deportation Order—Habeas Corpus—Duty of Court—Native Custom—Barbarous Custom—Deposed Chiefs Removal Ordinance (Laws of Nigeria, 1923, *c.* 78, *as amended by Ord.* 9 *of* 1925), *s.* 2.

The Governor of Nigeria, purporting to act under the Deposed Chiefs Removal Ordinance, ordered the appellant to leave a specified area, and upon his failing to comply ordered his deportation to another place in the Colony. The appellant applied to the Supreme Court of Nigeria for a writ of habeas corpus, contending (1.) that he was not a native chief, (2.) that he had not been deposed, (3.) that there was no native law or custom which required him to leave the area, and that consequently the conditions did not exist entitling the Governor to make the orders.

Held, that the powers of the Governor under the Ordinance were purely executive, and that it was the duty of the Court to investigate the questions raised by the appellant's contentions and to come to a judicial decision thereon.

The Governor can make a deportation order under s. 2, sub-s. 2, of the Ordinance without previous proceedings before a magistrate.

A native custom which originally was barbarous, and therefore one to which a Court could not give effect, may have become recognized by the native community in a milder and acceptable form without losing its essential character of custom, but the Court cannot itself transform a barbarous custom into a milder one.

Judgment of the Supreme Court of Nigeria reversed.

APPEAL (No. 42 of 1930) from a judgment of the Full Court of the Supreme Court of Nigeria (March 3, 1930) affirming a judgment of Tew J. (May 9, 1929) whereby a motion by the appellant for a writ of habeas corpus was dismissed.

The appellant's motion had been remitted to the Supreme Court for hearing by an Order in Council made upon a previous appeal—namely, *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria.* (1)

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* *Present:* LORD BLANESBURGH, LORD ATKIN, and SIR LANCELOT SANDERSON.

The proceedings related to two orders made by the first respondent on August 6 and 8, 1925, respectively under the Deposed Chiefs Removal Ordinance, 1917 (c. 78 of the Laws of Nigeria, 1923), as amended by Ordinance No. 9 of 1925.

The facts and the terms of the Ordinance as amended appear from the judgment of the Judicial Committee.

1931. Feb. 3, 5, 6, 9. *Sir Boyd Merriman K.C.*, *Horace Douglas* and *Wells Palmer* for the appellant.

Hon. Sir Stafford Cripps S.-G. and *S. E. Pocock* for the respondents, the Officer administering the Government and the District Officer of Oyo.

[Reference was made to *Rex* v. *Governor of Brixton Prison* (2); *Secretary of State for Home Affairs* v. *O'Brien* (3); *Barnardo* v. *Ford* (4); *Amodu Tijani* v. *Secretary, Southern Nigeria* (5); *Adanji* v. *Hunvoo* (6); also to the Supreme Court Ordinance.]

March 24. The judgment of their Lordships was delivered by

Lord Atkin. This is an appeal from a decision of the Full Court of the Supreme Court of Nigeria, which dismissed the appellant's appeal from the judgment of Tew J., discharging what by consent of the parties was deemed to be a rule nisi for a writ of habeas corpus addressed to the respondents.

The case has an unfortunate history. The appellant was ordered into custody on August 8, 1925, and though within a few hours he took every legal step to question the validity of his detention, the matter is still before the Courts, and, as will appear from this judgment, has still to be heard ab initio by the Supreme Court of the Colony. The case has already been before this Board on a refusal by one of the judges, affirmed by the Supreme Court, to hear an application for a rule nisi for habeas corpus on the ground that a similar application had already been heard and determined by another judge. The Board then decided

(1) [1928] A. C. 459.
(2) [1916] 2 K. B. 742.
(3) [1923] A. C. 603.
(4) [1892] A. C. 326.
(5) [1921] 2 A. C. 399, 405, 406.
(6) (1908) 1 Nig. L. R. 74.

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Eshugbayi Eleko v. Government of Nigeria (Officer Administering).

that the well-established rule that applications in habeas corpus may be made to successive judges existed in Nigeria, and remitted the case to the Supreme Court. The early history of the applicant's abortive attempts to establish his right to liberty are narrated in the judgment of this Board delivered by Lord Hailsham on June 19, 1928 (1), and need not be repeated. The application so remitted was originally made by notice of motion dated December 8, 1925. In pursuance of the Order in Council it came on for hearing before Tew J. on January 15, 1929, when it was agreed that the motion should be treated as if an order to show cause had been made. Their Lordships have recently had occasion to say in the case of *The Commissioner for Local Government, etc.* v. *Kaderbhai* (2), that in applications for such writs as mandamus and habeas corpus it is important that the proper procedure should be maintained, and that the actual rule or order asked for or made should be formulated. The rights of the parties are, however, not affected in any way in this case by the departure from strict form.

It is now necessary to state the nature of the appellant's complaint, and the circumstances in which it arose. He is the successor of Docemo, who was the ruling chief of Lagos in 1861, when he by treaty ceded Lagos to Her Majesty Queen Victoria. His precise position at the time of the order of which he complains in August, 1925, is in dispute: but it is plain that in 1901 the Governor of Lagos recognized him as head of the family of Docemo in succession to one Oyekan, and it is also plain that in 1920 the Governor of Lagos regarded him with less cordiality, and by announcement in the Nigeria Gazette intimated what would be in future the relation of the applicant to the Government.

In 1917 there was passed the Deposed Chiefs Removal Ordinance, which as amended in 1925 is so far as is material in the following terms:—

"1. This Ordinance may be cited as the Deposed Chiefs Removal Ordinance.

"2. (1.) When a native chief or a native holding any office under a native administration or by virtue of any native law or custom has been deposed or removed from his office by or with the sanction of the Governor, whether such deposition or removal shall have been before or after the commencement of this Ordinance, the Governor may :—

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(1) [1928] A. C. 459.

(2) Since reported P. 652 ante.

"(*a*) If native law and custom shall require that such deposed chief or native shall leave the area over which he exercised jurisdiction or influence by virtue of his chieftaincy or office ; or

"(*b*) If the Governor shall be satisfied that it is necessary for the re-establishment or maintenance of peace, order and good government in such area that the deposed chief or native shall leave such area or any part of Nigeria adjacent thereto,

by an order under his hand direct that such chief or native shall, within such time as shall be specified in the Order, leave the area over which he had exercised jurisdiction or influence and such other part of Nigeria adjacent thereto as may be specified in the Order, and that he shall not return to such area or part without the consent of the Governor.

"For the purposes of this section the following parts of Nigeria (and no others) shall be deemed to be adjacent to an area over which a deposed chief or native exercised jurisdiction or influence by virtue of his chieftaincy or office :—(I.) If the area is situated in the Colony : The Colony and the Provinces of Abeokuta, Ijebu and Ondo. (II.) If the area is situated in one of the Provinces of Ilorin, Oyo, Abeokuta, Ijebu and Ondo : The Colony and all provinces next adjacent to the province in which the area is situated. (III.) If the area is situated in any other province : All provinces next adjacent to the province in which the area is situated.

"(2.) Any deposed chief or native who shall refuse or neglect to leave such area or part of Nigeria as aforesaid, as directed by the Governor, or who having left such area or part of Nigeria shall return thereto without the consent of the Governor, shall be liable to imprisonment for six months, and the Governor may by writing under his hand and seal order such deposed chief or native to be deported, either forthwith or on the expiration of any term of imprisonment to which he may have been sentenced as aforesaid, to such part of Nigeria as the Governor may by such order direct.

"(3.) An order of deportation under Sub-section (2.) may be expressed to be in force for a time to be limited therein or for an unlimited time, and shall have the same force and effect as an order of deportation made under the Criminal Code."

By the Interpretation Ordinance, 1923, s. 3: "In every ordinance, unless there be something repugnant in any subject or context, ... (18.) 'Chief' or 'Native Chief' means any native whose authority and control is recognized by a native community."

On August 5, 1925, some of the members of the house of Docemo met together and purported to depose the applicant from his position as head of the house of Docemo. That they were the majority of the house of Docemo, or entitled by native law and custom to depose the applicant, or that the meeting was valid, was and apparently is contested by the applicant and other members of his house, as appears by a letter of protest, dated August 14, 1925, purporting to record resolutions adopted at a meeting of 150 members of the house held on August 12. However, the validity of the proceedings does not appear to have been regarded as doubtful by the Government, for on August 6 the following announcement was made in the Nigeria Gazette:—

"Lagos, Thursday, August 6, 1925.

It is hereby announced for general information that His Excellency the Officer Administering the Government has by the instrument set out below sanctioned the deposition of Eshugbayi from his position as head of the House of Docemo also known as the house of Docemo-Oyekan and has sanctioned his removal from the office of Eleko.

It is further notified that His Excellency the Officer Administering the Government by an order made under s. 2 of the Deposed Chiefs Removal Ordinance has ordered Eshugbayi to leave the Colony and the Provinces of Abeokuta, Ijebu and Ondo within twenty-four hours of the service of the Order upon him.

How compassionate! English GO HOME!

His Excellency the Officer Administering the Government has been pleased to direct that a compassionate allowance of 20*l*. a month be paid to Eshugbayi so long as he be of good behaviour.

[illegible]!!

T. S. A. THOMAS,
Acting Chief Secretary to the Government.
Chief Secretary's Office, Lagos.

WHEREAS by a notice dated December 8, 1920, and published in an Extraordinary Gazette dated December 8, 1920, His Excellency the Governor announced that as from December 1, 1920, the Government of Nigeria had ceased to recognise Eshugbayi, commonly known as 'Eleko,' as head of the house of Docemo or as holding any position which might entitle him to official recognition from the Government or any of its officers.

And whereas on August 5, 1925, a majority of the representative members of the families descended from Addo (hitherto commonly referred to as the house of Docemo or the house of Docemo-Oyekan) deposed Eshugbayi from his position as head of the house of Docemo, also known as the house of Docemo-Oyekan, and removed him from the office of Eleko;

And whereas His Excellency the Officer Administering the Government is satisfied that the persons who have so deposed Eshugbayi and removed him from the office of Eleko are the persons who by native law and custom are entitled so to depose the said Eshugbayi and to remove him from the office of Eleko;

Now therefore His Excellency the Officer Administering the Government hereby sanctions the deposition of Eshugbayi from his position as head of the house of Docemo, also known as the house of Docemo-Oyekan, and his removal from the office of Eleko.

By His Excellency's Command,
J. DAVIDSON,
Acting Administrator.

Lagos, August 6, 1925."

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On the same day, August 6, the Acting Governor made the order referred to in the above notice :—

"WHEREAS Eshugbayi, a native chief holding the office of Eleko in the Colony, has with my sanction been deposed and removed from his Office ; And whereas Native Law and Custom requires that the said Eshugbayi shall leave the area over which he exercised influence by virtue of his office :

Now therefore I do hereby direct that the said Eshugbayi shall leave the said Colony and the Province of Abeokuta, Ijebu and Ondo within twenty-four hours of the service of this Order and that he shall not return to any of the said areas without my consent.

Given under my hand August 6, 1925.

(Signed) F. M. BADDELEY,
Officer Administering the Government."

On August 8, as the order had not been obeyed, the Acting Governor made the order of deportation under which the applicant is now detained :—

"WHEREAS Eshugbayi, a native chief holding the office of 'Eleko' in the Colony was by an Order made under my hand on August 6, 1925, ordered to leave the Colony and the Provinces of Abeokuta, Ijebu and Ondo within twenty-four hours of the service upon him of the said order ; And whereas the said Eshugbayi has refused or neglected to leave the said Colony and the Provinces of Abeokuta, Ijebu and Ondo :

Now therefore I do hereby order that the said Eshugbayi be deported forthwith to Oyo in the Province of Oyo.

Given under my hand and the seal of the Colony and Protectorate of Nigeria at Government House, Lagos, August 8, 1925.

(Signed) F. M. BADDELEY,
Officer Administering the Government."

The applicant contests the validity of both orders, though the main attack is necessarily directed to the first. He says : (1.) He was not a native chief, and did not hold an office. (2.) He was not deposed or removed from this office, and the Governor's sanction was therefore irrelevant. (3.) There was no native law and custom which required him, or any chief or native, whether deposed in the manner alleged against him or in any other way, to leave the area in question. He says that these are three conditions precedent to any authority to make an order of withdrawal, and their existence can and must be investigated by the Court whenever the validity of the order or a deportation order founded on it is the subject of contest in judicial proceedings.

These were in substance the contentions of the applicant's counsel on the hearing of the motion. Counsel for the Government maintained that the Court had no power to enter upon an investigation as to any of these points: the order of the Governor must be taken as equivalent to the order of a court of competent jurisdiction determining within its powers all matters necessary to give jurisdiction; the order was analogous in its independence of the Courts to a committal by the House of Commons for contempt; and in any case the election or deposition of chiefs was an Act of State not cognizable by the Courts.

On these contentions the learned judges in Nigeria have taken a variety of views. Tew J. held that with points (1.) and (2.) the Court could not deal. He referred to the definition of native chief, and thought it would be absurd for a Court to attempt to decide whether a person came within this definition. It was within the province of the executive alone to decide what measure of authority or control would be necessary to make a person a chief. The question of native law and custom, he thought, was cognizable by the Court, and he proceeded at a further hearing to hear evidence, and eventually he decided that the custom existed entitling the Governor to make the order of August 6. Their Lordships will revert to this finding. In the result he discharged the rule with costs as from the time the matter was remitted by the Privy Council. On appeal there was a division of opinion. Lloyd J. thought that by the ordinance the Governor, whether technically a Court or not, was given power to decide whether the necessary conditions had been fulfilled, and he had so decided, and the Court could not now inquire whether that decision was right. He quite logically thought on this principle that the trial judge should not have investigated the question of native custom. Berkeley J. appears to have thought that the Court could determine at any rate the first two questions, for he proceeded to decide that the applicant was a chief and that he had been deposed. What his opinion was as to native custom does not appear from his judgment, for he does not refer to it. Petrides J. was of opinion that all the questions could be inquired into; but he was satisfied with Tew J.'s finding as to custom. The appeal was therefore in accordance with the judgment of the majority dismissed with costs.

Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive. The analogy of the powers of the English Home Secretary to deport aliens was invoked in this case. The analogy seems very close. Their Lordships entertain no doubt that under the legislation in question, if the Home Secretary deported a British subject in the belief that he was an alien, the subject would have the right to question the validity of any detention under such order by proceedings in habeas corpus, and that it would be the duty of the Courts to investigate the issue of alien or not. The case of *Rex* v. *Governor of Brixton Prison* (1) turned first on the question whether the regulation under which the order was made was ultra vires, which was a question of law. It further turned on the question whether the Secretary of State was abusing the powers given to him under the order by using them to deport a mere criminal, who, it was suggested, was no danger to the State. The Court expressly held they had power to consider this question and resolved it against the applicant. The question whether the applicant was an alien or not did not arise. He admittedly was; but their Lordships agree with the opinion of Low J. that, had the matter been in dispute, the Court would have had to decide it. A suggestion was made by one of the learned judges that the order in this case was an act of state. This phrase is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the act.

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(1) [1916] 2 K. B. 742.

Their Lordships, in view of the importance of the topic, have thought it necessary to call attention to these well-established principles. On the argument of this case they were relieved from a prolonged discussion of them, for the Solicitor-General, on behalf of the respondents, threw over the suggestion that the conditions were not cognizable by the Courts. He admitted that they were, but contended that on the inquiry by the Courts the evidence of the Governor was conclusive that the facts were as stated. Native chiefs were, he said, appointed and deposed by the Crown. Chieftaincy was either a title of dignity or an office, or it might be both. In either case the Crown gave and the Crown took away, and evidence by the representative of the Crown that he had either given or taken away was evidence which the Court was either bound to accept or ought to consider so strong that no other evidence could reasonably displace it. It was true, he said in substance, that the ordinance referred to deposition or removal from office by or with the sanction of the Governor; but those words amounted to the same thing. If to conciliate native prejudices or for other reasons the Government affected to leave the right of appointment or removal to native custom, subject to the sanction of the Governor, that was mere diplomacy. In fact the Governor appointed and removed in every case, and when he said that he had done so, it was so.

It is obvious that contentions such as these may seriously affect the rights of natives in Nigeria. Their validity depends upon the powers of the Crown and the Governor and upon constitutional usage in Nigeria and possibly other African colonies, which have never been investigated in this case in the appropriate original tribunal, the Courts of the Colony. Their Lordships have a difficulty in finding in the Letters Patent or the Instructions to the Governor any express authority given to the Governor to act on his own initiative as to the appointment or deposition of chiefs, and they see the necessity of reconciling the existence of the suggested powers with the rights of the native communities laid down by Lord Haldane in giving the judgment of the Privy Council in *Amodu Tijani* v. *Secretary, Southern Nigeria.* (1) Prima facie deposition with the sanction of the Governor would appear to point to deposition by some authority other than the Governor which would only become effective when sanctioned by the Governor; in which case it would appear that a valid deposition by the appropriate authority would be necessary as well as the sanction by the approving authority. And this appears to be the view adopted by the Crown advisers in the Colony so far as one may judge from the affidavits filed by them. It may be, however, that the contention made by the Solicitor-General before their Lordships, if adopted by the Crown advisers in the Colony, will on investigation by the Courts be found to be correct. It is only necessary for this Board to decide that it is the duty of the Courts to investigate the whole of the questions raised and come to a judicial decision.

It is desirable to add that the first two points involve questions of fact upon which statements made by the executive are by no means conclusive. In particular, their Lordships cannot accept the opinion that the Courts of Nigeria are incapable of deciding the question whether the authority or control of a native is recognized by a native community. Compared with many judiciable issues with which Courts of the Empire are from time to time faced, the question appears simple. The questions whether an office or a dignity exists, whether a person has been appointed to it or removed from it are all issues which the Courts will have to decide after hearing the relevant evidence tendered by either side.

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(1) [1921] 2 A. C. 399.

It is necessary to include in the further hearing the question raised as to native custom. It seems obvious that it is difficult to ascertain whether there is a native custom applicable to a chief deposed without taking into consideration the manner of the deposition. Native custom may require the departure of a chief deposed according to native custom; but conceivably it may not apply to a chief alleged to be deposed, but in violation of native custom, or deposed by some external power newly brought into existence and never contemplated by native custom. Since the trial judge thought that the fact of deposition was not cognizable by the Court the application of the native custom to the actual deposition in this case does not appear to have been investigated, and the whole question must be determined anew. An interesting question arose at the hearing as to the modification of an original custom to kill into a milder custom to banish. Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilization become milder without losing their essential character of custom. It would, however, appear to be necessary to show that in their milder form they are still recognized in the native community as custom, so as in that form to regulate the relations of the native community inter se. In other words, the Court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to "natural justice, equity and good conscience." It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate.

One of the contentions of the applicant their Lordships are able to determine. It was said that it was a condition precedent to the power of the Governor to make a deportation order that the native chief alleged to have disobeyed the withdrawal order should first have been charged and convicted before a magistrate. It was said that this was the construction of s. 18, sub-s. 9 (*d*), of the Criminal Code, and that s. 2, sub-s. 3, of the Deposed Chiefs Removal Ordinance provides that a deportation order is to have the same force and effect as an order of deportation under the Criminal Code. Whether the section in the Criminal Code has the suggested effect or not, their Lordships do not find it necessary to decide. Here the powers are expressly given by s. 2, sub-s. 2, of the Ordinance, and their Lordships entertain no doubt that the powers of deportation given to the Governor are executive powers quite independent of the question whether the native has committed a criminal offence. This contention of the applicant therefore fails.

The matter should be remitted to the Supreme Court to be heard on the motion of December 4, 1925.

Their Lordships think it desirable to indicate the procedure proper now to be adopted. The parties agreed when the case was formerly remitted that it should be heard as though a rule nisi had been granted. The rule should be drawn up, and in the circumstances it had better be dated as of January 15, 1929, the day when the agreement was made, being the first day of the hearing, and it should be treated as though argument were directed forthwith. The affidavits to be recited as read will be the affidavits filed by the applicant up to August 29, 1928, not including the affidavits of the Crown and those filed by the applicant in reply.

The rule nisi will therefore take the following form :—

Tuesday, the 15th day of January, 1929.

IN THE SUPREME COURT OF NIGERIA.

Divisional Court No. 2.

Before His Honour Justice M. L. Tew.

Nigeria.

Upon reading the several affidavits of Eshugbayi, Eleko [and others, stating them], It is ordered that this day, the 15th day of January, 1929, be given to the Officer administering the Government of Nigeria and the District Officer of Oyo to show cause why a writ of habeas corpus should not issue directed to them to have the body of Eshugbayi, Eleko, immediately before this Court at Lagos to undergo and receive all and singular such matters and things as the Court shall then and there consider of concerning him in this behalf.

Upon the ground that :—

1. The said Eshugbayi, Eleko, was not on August 6, 1925, or thereafter a native chief and did not hold any office.

2. That the said Eshugbayi, Eleko, had not on August 6, 1925, or thereafter been deposed or removed from any office.

3. That native law and custom did not require that the said Eshugbayi, Eleko, should leave any area over which he exercised influence by virtue of any office or at all.

4. That by reason of the premises the order under the hand of the Officer Administering the Government, dated the 6th day of August, 1925, and the order under the hand of the said officer and seal of the Colony and Protectorate of Nigeria dated the 8th day of August, 1925, concerning the said Eshugbayi, Eleko, are invalid.

Upon notice of the said order given to the said Officer Administering the Government and the said District Officer by their counsel this day.

Upon the motion of Mr. Wells Palmer.

The rule may be modified if necessary to adjust the formal terminology, and the applicant is to have liberty to modify or add to the grounds if so advised. Their Lordships give no directions as to the judge by whom the rule is to be heard ; this will be decided by the Supreme Court in accordance with its practice. The affidavits filed are to be treated as in evidence ; the Court will give such directions as it thinks fit as to the production of other evidence, whether written or oral, and by cross-examination of deponents or otherwise. The oral evidence already given to the Court will not be available unless and to the extent that both parties consent.

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It was given originally when the issue as to deposition and the nature of it was not before the Court. On the argument of the rule counsel for the respondents to the motion should show cause, and counsel for the applicant should then, if required, reply in support of the rule.

In the result, therefore, the appeal should be allowed and the judgments of Tew J. of February 5, 1929, and May 9, 1929, and the judgment of the Full Court dated March 3, 1930, should be discharged, and the case remitted for hearing to the Supreme Court, in accordance with the directions given above, and their Lordships will humbly advise His Majesty accordingly. The respondents must pay to the applicant his costs of this appeal and of the appeal to the Full Court. The costs of the hearings before Tew J. will be reserved to the Court which re-hears the rule nisi, and, failing such re-hearing, to the Supreme Court.

Solicitor for appellant: *E. F. Hunt.*
Solicitors for respondents: *Burchells.*

[PRIVY COUNCIL.]

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EGYPTIAN SALT AND SODA COMPANY, LIMITED . . . . APPELLANTS;

AND

PORT SAID SALT ASSOCIATION, LIMITED . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT FOR EGYPT.

Company—Ultra Vires—Memorandum of Association—Objects—Manufacturers and Dealers in Salt—Export of Salt from Egypt—Agreement with Promoters not to export.

When salt was a Government monopoly in Egypt, the Egyptian Government granted to a company (hereinafter called the syndicate) a concession to exploit two named areas for salt and the exclusive right to export salt obtained from one of them; the Government reserved the right to cancel its salt monopoly, but if it did so the concession to exploit the areas was to continue. The monopoly was cancelled in 1906. The appellant company, promoted by the syndicate, was incorporated under the English Companies Acts in 1899, and entered into an agreement with the syndicate to purchase its rights under the concession; it was expressly provided, however, that the appellant company should not export salt. The memorandum of association of the appellant company stated that its objects, among others, were: (*a*) to enter into, with or without modification, the agreement above mentioned; (*b*) to obtain from the Government concessions to carry on any business or monopoly; (*d*) to carry on the business of manufacturers and dealers in salt; (*j*) to undertake all such trading operations in connection with the objects as the company thought fit. The export of salt was not expressly included in or excluded from the stated objects.

Held, that the memorandum of association did not exclude from the permitted objects of the appellant company the export of salt from Egypt, and that the respondent company, who were shareholders therein, were not entitled to an injunction restraining the appellant company from that part of their business.

Judgment of the Supreme Court for Egypt reversed.

APPEAL (No. 90 of 1930) from a decree and order of His Britannic Majesty's Supreme Court for Egypt, at Alexandria (June 11, 1930), declaring that the export of salt from Egypt was outside the powers of the appellant company contained in its memorandum of association and granting an injunction

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* *Present:* LORD HANWORTH M.R., LORD MACMILLAN, and SIR LANCELOT SANDERSON.

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restraining the appellant company, its servants and agents from exporting salt from Egypt.

The material facts of the case appear from the judgment of the Judicial Committee.

1931. March 12. *W. A. Greene K.C.* and *R. J. T. Gibson* for the appellants.

Lionel Cohen K.C. and *W. Gordon Brown* for the respondents.

April 21. The judgment of their Lordships was delivered by

LORD MACMILLAN. The sole question at issue in this appeal is whether it is permissible for the appellant company, having regard to the terms of its memorandum of association, to engage in the business of exporting salt from Egypt. The respondent company is a shareholder of the appellant company and as such asks, and has obtained from His Britannic Majesty's Supreme Court for Egypt, an injunction restraining the appellant company from engaging in this branch of business. The present appeal is against the order so obtained.

To place the controversy in its due setting it is necessary to refer to the agreed documents in the case. From these the essential facts may be briefly extracted. It appears that by decree of August 26, 1886, the Khedive established a monopoly in Egypt of the extraction, manufacture and sale of salt and natron or native sodium carbonate. In 1897 an Egyptian limited company, the Société Anonyme des Soudes Naturelles d'Egypte, which it will be convenient to call "the Egyptian Soda Company," was formed to operate a concession obtained by it from the Egyptian Government. This concession conferred on the Egyptian Soda Company the exclusive right to exploit the minerals and natural products in the lands or lakes of a domain known as Wadi-Natron, which is situated to the west of the Nile in Lower Egypt, and in particular to manufacture and export soda. The concession expressly stipulated that the Egyptian Soda Company should on no account sell or export salt, this being a monopoly of the State. Thereafter an English syndicate, known as the Egyptian Syndicate, Ld., acquired the undertaking of the Egyptian Soda Company, including its Wadi-Natron concession, and shortly afterwards entered into an agreement with the Egyptian Government whereby the latter ratified the transfer to the syndicate of the Egyptian Soda Company's Wadi-Natron concession and further conferred on the syndicate the Government's monopoly right of manufacturing and selling salt in Egypt, the two concessions to be merged into one in the hands of the syndicate. The salt was to be obtained by the syndicate exclusively from the salines or salt deposits of Mex in the western part of Lake Mariout, and the sole right to export the salt so obtained was conferred on the syndicate. In this agreement with the syndicate the Egyptian Government expressly reserved the right on six months' notice to abolish the salt monopoly, in which case, however, the syndicate was to continue to have the right of exploiting the salines of Mex and the Wadi-Natron concession was to remain in full force. The syndicate thus came to hold both the Wadi-Natron concession with the right to manufacture and export soda and the Mex concession with the right to exercise the Government's monopoly of selling salt in Egypt and for export.

The syndicate next proceeded to promote the appellant company and an agreement between the syndicate and the company about to be formed was prepared, being the agreement referred to in head 3 (A) of the appellant company's memorandum of association quoted below. The appellant company was duly incorporated under the English Companies Acts on October 27, 1899, and the agreement was executed three days later on October 30, 1899. It provided for the purchase by the appellant company from the syndicate of: (1.) the undertaking of the Egyptian Soda Company and its Wadi-Natron concession, and (2.) the rights of the syndicate under the Mex concession "but with the reservation that the company shall not do any export trade in salt, such right of export being reserved by the syndicate from the sale to the company. The syndicate in exercise of such reserved rights of export of salt being bound by all the conditions imposed by the Government upon the export of salt under the terms of the said concessions." Consequently, while the appellant company acquired the syndicate's right to manufacture and sell salt in Egypt it did not acquire its right to export salt from Egypt, and was disabled from engaging in the exportation of salt so long at least as the Government monopoly continued in force. The monopoly right of exporting salt which the syndicate had obtained from the Government and which it excluded from the sale to the appellant company was, however, subject to the Government's expressly reserved right to terminate the salt monopoly. This reserved right the Government subsequently exercised, and from January 1, 1906, the salt monopoly was entirely abolished, whereupon the reservation of the right of export in the agreement between the syndicate and the appellant company ceased to operate as a restriction disabling the appellant company from engaging in the export of salt, except in so far as it had any contractual effect.

It is now necessary to set out at some length the material parts of the memorandum of association of the appellant company on the construction of which the determination of the question at issue depends. Head 3 declares "the objects for which the company is established" to be (inter alia) as follows:—

"(A) To acquire and take over as a going concern and work the undertaking of La Société Anonyme des Soudes Naturelles d'Egypte, a corporation constituted in Egypt under the local laws, and all or any of the assets of that company, and to enter into, with or without modification, the agreement mentioned in article 3 of the articles of association of the company filed with this memorandum, and to do all acts in relation to the working in Egypt and its dependencies of salines and of natron deposits, and selling and importing salt and natron, and otherwise, and to enter into any further agreements in relation to the same matters, or any of them or to the manufacture of oil soap and other oleaginous or similar substances or products.

(B) To obtain from the Government of Egypt, and any other governments, authorities and powers, concessions, rights, powers, authorities and privileges to carry on any trade, manufacture, business or monopoly.

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(D) To carry on the business of miners, quarriers, explorers, prospectors, manufacturers of and dealers in salt and soda in its various forms, iodine and other products, chemists, druggists, drysalters, importers and exporters of and dealers in produce of wells, mines and quarries, smelters, glass manufacturers, reducers of minerals and metals, mineral and metal merchants and agents, engineers, general storekeepers, carriers and merchants, agents for the acquisition, sale, disposal of, and management of mines or other property, or any business which may be conducive to or assist in carrying out the objects of the company or developing any property acquired by the company."

In subsequent paragraphs further objects of the company are defined, including under (E) the working of deposits of salt or natron in any part of the world and the extraction and rendering marketable of salt or natron and other produce whether obtained by the company or others; under (J) the undertaking and carrying into effect of all such commercial, trading or other operations or businesses in connection with the objects of the company as the company might think fit; and under (T) the making of agreements with any company, firm or person in connection with the production, manufacture, sale or other dealings in salt, natron or other products. The last paragraph of head 3 is as follows:—

"(U) To carry out the above objects or any of them either on account of the company alone or in conjunction with any other company, association, firm, person or persons, and in any part of the world and generally to do all such acts and things as are incidental or conducive to the attainment of all or any of the above objects."

It will be observed that the memorandum of association nowhere in terms prohibits the appellant company from exporting salt from Egypt, but the learned judge in the Court below has held as the result of a carefully reasoned judgment that the export of salt is inferentially excluded from the contemplated or permitted objects of the company. This inference is drawn from a consideration of the language of the memorandum, the terms of the agreement referred to in clause (A), and the surrounding circumstances at the time when the memorandum was framed. The learned judge says that "the memorandum is to be construed strictly." If by this he meant merely that the memorandum must be construed in accordance with the accepted principles applicable to the interpretation of all legal documents no exception need be taken to his statement, but if he meant that a specially rigid canon of construction is to be applied to the memoranda of association of limited companies their Lordships do not agree. A memorandum of association like any other document must be read fairly and its import derived from a reasonable interpretation of the language which it employs.

As regards the aid to interpretation to be derived from surrounding circumstances the learned judge has in their Lordships' view taken too wide a scope. It must be borne in mind that the purpose of the memorandum is to enable shareholders, creditors and those who deal with the company to know what is its permitted range of enterprise, and for this information they are entitled to rely on the constituent documents of the company. They have not access to other sources of information such as the antecedent transactions which the learned judge invokes, and have no means of knowing, for example, "that the intention of the promoters that the company should not export salt was known to the defendant company," a circumstance which the learned judge adduces. The intention of the framers of the memorandum must be gathered from the language in which they have chosen to express it.

Turning then to the memorandum, their Lordships recognize that one of the objects placed in the forefront of head 3 is to enter into the agreement mentioned in clause (A), and that that agreement when examined is found to contain an express exclusion of the right to export salt. But the question to be decided is not one as to the contractual relations between the parties to the agreement. As between the company and the vendors to it the restriction may have imposed a limitation on the company's activities, but it is another matter to infer that the company intended for all time to exclude itself from the export trade in salt even should it otherwise become permissible for it to engage in this business. The language of the agreement itself in reserving to the vendors the right of exporting salt assumes the existence of their monopoly right, and that monopoly was terminable at any time. It is unlikely that the appellant company should have intended to disable itself from exporting salt even if the monopoly should be abolished, as it has in fact been. Moreover the agreement was subject to modification or even cancellation by the parties to it, and the reservation as between them of the right to export salt might at any time have been abrogated.

While it is true that the "original first object" of the appellant company, to quote the words of Warrington J. (as he then was) in *Pedlar* v. *Road Block Gold Mines of India, Ld.* (1), was to acquire the concessionary rights of the syndicate except the right to export salt, the memorandum goes a great deal further. It states it to be one of the objects of the company to carry on the business of manufacturers of and dealers in salt and soda, iodine and other products, and this it may do in any part of the world. The business of dealing in salt in ordinary mercantile parlance plainly includes the sale of salt to purchasers abroad, without any express mention of exportation. As Lord Wrenbury said in *Cotman* v. *Brougham* (2): "Powers are not required to be and ought not to be specified in the memorandum. The Act intended that the company, if it be a trading company, should by its memorandum define the trade, not that it should specify the various acts which it should be within the power of the company to do in carrying on the trade." It was conceded that the company could under its memorandum legitimately acquire salt deposits outside Egypt and there engage in the exportation of salt, so that the export of salt is not outside the objects of the company. It is only, it was contended, the exporting of salt from Egypt which is not within the

(1) [1905] 2 Ch. 427, 435.

(2) [1918] A. C. 514, 522.

ambit of the company's objects, a quite special limitation to be derived, not from the terms of the memorandum, but from the agreement to which it refers.

The respondents' argument was supported by references to passages in the memorandum where mention is expressly made of the importing of salt and the exporting of other produce, and the omission of any mention of the exporting of salt was thus said to be significant of an intention to exclude it from the company's objects. But once it is conceded that it is permissible for the company to export salt from countries other than Egypt this argument fails. In any case it involves the attribution to the draftsman of a degree of precision in the use of language which other parts of the document do not warrant and to the reader of it a refinement of perception not usually possessed by those to whom such documents are addressed.

The company, as its name denotes, is a trading and commercial company dealing in salt and soda. Prima facie one would expect it to have among its permitted objects all the ordinary transactions of trade, domestic and foreign, in the commodities in which it is established to deal. In their Lordships' view no ordinary reader of the memorandum would infer from it that the company was under a special prohibition not to engage in the export of salt from Egypt. The learned judge below after finding that there was an agreed intention to form a company which should not do any export trade in salt, goes on to say: "The obvious way to carry out that agreement was to phrase the memorandum of the company to be formed in such a way that the company should not have the right to export salt," and states, very properly, that the "point for decision" is "whether the obvious method was adopted and the intention was effectively carried out by the memorandum." He then finds by inference from the intention of the promoters, which was known to the company, and from the fact that one of the company's main objects was to enter into the agreement in which the restriction was set forth that the memorandum must be read as if it contained the express words "but not exporting from Egypt."

Their Lordships cannot accept this interpretation. In their view the "obvious method" was not adopted and the memorandum does not effectively carry out the intention, if intention there was, to exclude from the permitted objects of the company the export of salt from Egypt.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed and the injunction granted by the Court below dissolved. The appellant company will have their costs here and below.

Solicitors for appellants: *Lattey & Dawe.*
Solicitors for respondents: *Herbert Smith & Co.*

[PRIVY COUNCIL.]

J. C.*
1931
April 24.

SCALES . . . . APPELLANT;

AND

YOUNG AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

New Zealand—Licensing—Jurisdiction to grant Licence—New licensing District—Amalgamation of Areas in which Licences prohibited and allowed—Restoration—Substituted Licence—Licence ceasing by "no-licence" Vote—"Otherwise cease to exist"—Licensing Amendment Act, 1910 (*No.* 46 *of* 1910, *N. Z.*), *ss.* 12, 30.

The appellant was the lessee of an hotel in New Zealand for which a publican's licence was held before 1903, but the licence then ceased owing to a "no-licence" vote in the district under the then existing law. The district was still a "no-licence" district in 1928, when there was constituted under the Licensing Act, 1908, a new electoral and licensing district, consisting of part of the licensing district in which the hotel was situated, including the hotel, and part of an adjoining licensing district in which licences were allowed. The first licensing poll in the new district was taken in November, 1928. There was no poll whether there should be a restoration of licences, because the area in which licences were prohibited contained less than half the population of the new district, and under s. 12 of the Licensing Amendment Act, 1910, no poll was to be taken in those circumstances. The special poll under the Licensing Amendment Act, 1918, resulted in a vote for national continuance as opposed to national prohibition. The appellant applied to the respondents, the licensing committee of the new district, at their first meeting for the grant of a publican's licence for the hotel, but the application was refused on the ground of want of jurisdiction. The appellant contended that the decision (affirmed by the Court of Appeal) was wrong (1.) because there had been, as the result of s. 12 of the Act of 1910, ipso facto a restoration of licences, so that they could be granted in the prohibited area to the extent prescribed by s. 11; (2.) because by s. 30 of that Act a new licence could be granted of the same description as one which " has been forfeited or has not been renewed or has otherwise ceased to exist," and that provision applied having regard to the loss of a publican's licence in 1903

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON, and LORD MACMILLAN.

Held, that the respondents had not jurisdiction to grant a licence for the hotel. Sect. 12 had not the effect contended, and the words " otherwise cease to exist " in s. 30 applied only when a licence had ceased to exist from a cause peculiar to itself. Further, s. 30 appeared to refer only to the case where a licence had ceased to exist between two successive meetings of the licensing committee of a district.

Judgment of the Court of Appeal of New Zealand [1929] N. Z. L. R. 855 affirmed.

Appeal (No. 89 of 1930) from a judgment of the Court of Appeal of New Zealand, delivered on November 6, 1929.

The appellant was lessee of an hotel in New Zealand situated in the Mid-Canterbury licensing district, which had been constituted as a new electoral and licensing district in 1928. At the first meeting of the licensing committee of the district, held in June 1929, the appellant applied to the respondents, the committee, for a publican's licence in respect of the hotel.

The circumstances in which the application was made, and the material provisions of the licensing legislation of the Dominion of New Zealand appear from the judgment of the Judicial Committee.

The respondents rejected the application on the ground that they had not jurisdiction to grant the licence.

The appellant thereupon moved the Supreme Court of New Zealand for a writ of certiorari to quash the decision, and for a writ of mandamus directing the respondents to hear and determine the application. By consent the hearing of the motion was moved into the Court of Appeal.

The Court of Appeal (Herdman, Adams, MacGregor, and Ostler JJ.) unanimously held that the respondents had not jurisdiction; the motion was accordingly dismissed. The proceedings are fully reported at [1929] N. Z. L. R. 855.

The Court gave leave to appeal to the Privy Council.

1931. March 20, 21, 24. *Sir Boyd Merriman K.C.*, *A. F. Wright*, and *C. L. Henderson* for the appellant.

G. R. Blanco White and *Ernest Hancock* for the respondents.

April 24. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. The actual facts which give rise to this case are really few and simple. The appellant is the keeper of the Somerset Hotel, situate in the town of Ashburton. The respondents are the licensing committee of the district of Mid-Canterbury within which the town of Ashburton is situate. The appellant applied at the sitting of the committee on June 7, 1929, for a publican's licence. The committee refused on the ground that they had no jurisdiction to grant the licence desired. Upon that the appellant raised proceedings by way of certiorari and mandamus. The proceedings were removed into the Court of Appeal for determination. That Court unanimously held that the committee had come to a right decision, but gave leave to appeal to His Majesty in Council.

To state the history as to the premises. Prior to 1903 Ashburton town was situate in the licensing district of Ashburton, and the Somerset Hotel enjoyed a publican's licence. In 1903, owing to a vote under the existing law, Ashburton became a district wherein no licences were to be granted, described as a "no-licence district" in contradistinction to a district in which licences were to be granted, described as a "licence district." At all the polls which from time to time, according to the legislation of the moment, were held in Ashburton the district remained no-licence and this was the state of affairs up till 1928. A word now as to the legislation. It has indeed been prolific. There were Acts dealing with licences in 1881, 1893, 1895, 1902 and

1904. Then in 1908 came a consolidating statute. But consolidation did not curb the avidity for legislation on the topic, and the Act of 1908 was amended and added to by statutes in 1910, 1914, 1917, 1918 and 1920. It is little wonder that one of the learned judges in the Court of Appeal characterized the total product as a "jungle of legislation."

Their Lordships do not think it necessary to examine in detail this mass of statutes. That has been done with infinite patience and accuracy in the judgments of the Court of Appeal, and it would be useless repetition to say just what they have said. But there are certain landmarks in the history which must be signalised, because it is upon them that the whole question turns. It is not necessary for the purposes of decision to go further back than the consolidating Act of 1908. For be it observed that when a Court is dealing with a consolidating Act, though the Court may refer to the former Acts so consolidated for the purposes of clearing up an ambiguity of expression if such be found, more it cannot do. If anything which had a place in former Acts has been left out it must be taken that it has been left out on purpose. But the Act of 1908 embodied one of what may be called the landmarks in the legislation. That landmark had made its appearance in 1893, but it is as dealt with in 1908 that it must be considered. That landmark was as follows. Prior to 1893 the licensing districts were formed as licensing districts for that purpose. But in 1893 a great change was effected. The licensing districts were made co-terminous with the electoral districts. By the Act of 1908 this arrangement was continued and, further, the licensing polls were taken along with the electoral polls. By s. 11 of the Act it was provided that at such licensing polls three questions should be put to the electors: (*a*) whether the number of licences existing in the district is to continue; (*b*) whether the number of licences existing in the district is to be reduced; (*c*) whether no licences are to be granted in the district: and no licence was allowed to be granted or renewed until there had been a determination of the electors as between these three questions, and then only if that determination so permitted. Moreover, under the law in New Zealand electoral districts are reformed and refashioned according to the result of periodical census returns. It was obvious that the result might be a merging of part or all of an old licensing district with part or all another old licensing district to form a new licensing district.

This in the Act of 1908 was dealt with by s. 8, which is as follows :—

" 8. Whenever by reason of changes in electoral districts the whole or any part of the area of a licensing district (hereinafter called an 'original district') becomes comprised within the boundaries of another licensing district (hereinafter called a 'new district'), the following provisions shall apply : (*a*) Until the committee of the new district is duly constituted, the committee of the original district shall continue to have jurisdiction throughout the whole of the original area thereof in like manner as if such district existed unchanged.

(*b*) Until the first valid licensing poll in the new district comes into force therein the result of the licensing poll in force in the original district immediately prior to the change shall continue in force throughout the whole of the area thereof in like manner as if such district existed unchanged.

(*c*) If when the first licensing poll is to be taken in the new district the grant of licences is prohibited throughout any area thereof containing more than half the population of the district, the poll shall be taken under section thirty-eight hereof, as if no licences existed in the district : Provided that if the result of such poll is that licences be not restored in the district, then, notwithstanding such result, every licence of any description existing at the time of the taking of the poll shall, subject to the provisions of this Act relating to forfeiture for breaches of the law, continue in force until the expiration of the current term of such licence, and shall then lapse.

(*d*) In any other case the first such poll shall be taken under sections eleven to twenty-eight hereof, as if the grant of licences were not prohibited in any part of the new district."

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Sect. 38 provides that in any "no-licence district" as determined by the population there shall be a poll for restoration.

To make the point arising on these sections intelligible it is necessary to resort to the history of Ashburton district and Ashburton town. As already mentioned, Ashburton district had been continuously no-licence from 1903 up to 1928. The neighbouring district, whose frontier marched (to use a convenient Scotch term) with that part of Ashburton district where Ashburton town was situate was Ellesmere, and Ellesmere had been continuously a licence district. But in 1928, owing to electoral changes, the districts of Ashburton and Ellesmere both disappeared, and a new district called Mid-Canterbury sprang into existence, formed partly of Ellesmere and partly of a part of Ashburton, in which part the town of Ashburton lay. The population of the Ellesmere portion was more than half of the whole, and consequently the poll would under the Act of 1908 have fallen to be taken in terms of s. 8 (*d*) on the footing that the granting of licences was not prohibited within Mid-Canterbury. In other words, Mid-Canterbury began its existence as a licence district, and the existing licences in the Ellesmere part became geographically licences existing in Mid-Canterbury. If what happened in 1928 had happened in 1909 the question which would have been put to each elector at the first poll after the creation of Mid-Canterbury would have been in terms of the second schedule of 1908 to determine whether he would say: "I vote that the number of licences existing in the district continue"; or, "I vote that the number of licences existing in the district be reduced"; or "I vote that no licences be granted in the district." Then s. 145 provides: "Except as provided in the last preceding section there shall not be granted any increase in the number of licences in any district until after the taking of the then next census."

The preceding section deals with a sudden increase of population and prescribes application to the Governor-General of the Dominion. As to the next census, increase of licences is only possible if there is an increase of population of more than 25 per cent. since the previous census. Putting aside therefore these methods of increase depending on a great increase of population—which did not happen—it is quite clear it would have been impossible to grant a new licence for the Somerset Hotel, because that would increase the number of existing licences in Mid-Canterbury by one.

Now it is impossible to tell, or even to speculate, what would have been the views of the electors residing in that part of Mid-Canterbury which had formerly been Ashburton. They may have shared the views of the majority in Ashburton and wished their district to be no-licence. On the other hand, they may have all along wished their district to be a licence district and been overborne by the outlying voters in the rural districts of Ashburton. On this latter assumption it is clear that their case was from their point of view a hard case. If the population of their portion had exceeded that of the Ellesmere portion, then the whole of Mid-Canterbury would have entered into life as a no-licence district, but at the very first poll there would have been a vote on restoration which might have been carried. But as it was their case was not dealt with in the statute. Their Lordships will not use the phrase " casus omissus," because that means that the legislation has per incuriam allowed a lacuna in legislation to exist. But in view of the determined insistence of the prohibitionists the lacuna may have been left of set purpose. One of the learned judges in the Court of Appeal considers he has found a justification. Others have characterized the omission as an injustice. Their Lordships do not propose to tender any opinion on the subject, which is one for the Legislature and not for them, but they are bound to remark that against what the learned judge urges in justification may well be set the remark that the whole legislation is supposed to rest on the will of the people as expressed by vote, and at least the population of the Ashburton portion of Mid-Canterbury would have to suffer their fate in silence.

So far their Lordships have viewed what would have happened if Mid-Canterbury had come into existence in 1909.

But it did not come into existence until 1928, and by that time the Act of 1908 was not intact, but had been amended. In particular it had been amended by the Act of 1910, and here comes the second great landmark in the legislation. By that Act the form of questions to be put at the licensing poll was altered. The new form of questions was fixed separately for no-licence districts and for licence districts. In the case of licence districts the choice was between "I vote for continuance" and "I vote for no-licence." This it will be observed dealt, not as did the questions under the 1908 Act, with the number of actual licences, but with the continuance of licences in general, and then s. 5 provided that if the proposal for no licences was not carried, or in other words if the vote for continuance gained the day, the number of licences should continue as they were, until at a subsequent poll the vote for no licences prevailed. That is to say, if continuance was carried, the licences became stereotyped as to number. Sect. 8 of the Act of 1908, which has been quoted, and which dealt with the situation arising when owing to electoral changes a new licensing district sprang into existence, was repealed; but it was substantially re-enacted by s. 12 of the Act of 1910, and it again exhibited the old lacuna. If the majority of the population in the new district belonged to an old no-licence district the new district entered life as a no-licence district, and there was to be a poll as to restoration in terms of ss. 8 to 11, which replaced with greater detail the repealed s. 38 of 1908; but if on the other hand the new district was a "licence district" then the only poll was that just set forth; and the licences de facto existing were stereotyped without provision for any licence being allotted to the included portion which had previously formed part of a no-licence district. And by s. 30, to which their Lordships will revert in detail, provision was made for the case where one of the stereotyped licences lapsed. There was also added another brace of questions to be settled at the poll—namely, whether there should or should not be national prohibition. This, if carried, would sweep away licences altogether.

Then eventually—for "finally" is a word whose use legislation such as this does not permit—came the Act of 1918. That provided for a special poll, where the two alternatives were national continuance and national prohibition with compensation: and then, if national continuance was carried at the special poll and the next poll thereafter—which happened—it provided in future that there should be three alternatives: (1.) national continuance; (2.) State purchase and control; (3.) national prohibition; and then s. 73, sub-s. 1, repealed ss. 3 to 5 of the Act of 1910 and prescribed that no questions as to local no-licence should be submitted to any poll. But by s. 77 it provided that in any no-licence district there should be submitted the question as to restoration, and this should be submitted as prescribed by ss. 8 to 11 of the Act of 1910.

Now the effect of these various enactments seems clear. In terms of s. 12 of the Act of 1910, which was the existing ruling Act as to what was to happen when owing to electoral change the new district of Mid-Canterbury came into being, that district was a licence district. Consequently in terms of s. 73, sub-s. 1, of the Act of 1918 no question as to local no-licence could be submitted to the first poll in Mid-Canterbury. But the existing licences in Mid-Canterbury being the de facto licences which had existed in Ellesmere continued, and could only be wiped out if the first poll had determined in favour of national prohibition—which it did not.

Now the first argument put forward by the learned counsel for the appellant was one that was not submitted to, and consequently not dealt with by, the Court of Appeal. Counsel contended that the effect of s. 12 of the Act of 1910, as applied to the facts, to wit, that the population of the Ellesmere portion (quondam licence) exceeded the population of the Ashburton part (quondam no-licence) was, to use his words, to effect "ipso facto restoration." His object in saying that was to contend that restoration being effected, s. 11 applied, and allowed licences to be granted as upon restoration they could be granted, i.e., to the extent of not less than one licence for each thousand electors, and that the appellant would have his chance of getting one of the new licences.

This argument really turns on what may be called a play on the word "restoration." In one sense the part of Ashburton which came into Mid-Canterbury did ipso facto undergo restoration. That is to say, an inhabitant of the town of Ashburton might say with satisfaction or regret according to his own views, "Before this I was in a dry district, now I am in a wet one." But that is not the sort of restoration which allows a new grant of licences under s. 11. Sect. 11 only speaks after there has been a determination under s. 8, i.e., a determination at a poll when the question has been put whether licences should be restored, and such a poll has never taken place in Mid-Canterbury, and never could take place, because Mid-Canterbury is not and never has been a no-licence district, and consequently s. 77 of the Act of 1918 cannot bring in ss. 8 to 11 of 1910.

Now the second argument, which was the chief argument before the Court of Appeal, and was repeated here, depended on the phraseology of s. 30 of 1910 as amended by 1920. That section is still in force. The amendments in 1920 were rather verbal than substantial, but in its amended form the section reads thus: "(1.) Save as provided by this Act in respect of the restoration of licences or by s. 144 of the principal Act with respect to the increase of licences, no new publican's licence, accommodation licence, New Zealand wine licence or wholesale licence shall be granted in any licensing district except when a licence of the description applied for has been forfeited or has not been renewed or has otherwise ceased to exist. In the case of a publican's licence, accommodation licence or New Zealand wine licence no such licence shall be granted in respect of premises situate beyond the limits fixed by sub-s. 4 of s. 127 of the principal Act.

"(2.) In every such case one new licence of the same description as the licence which has been forfeited or has not been renewed or has otherwise ceased to exist may at the first annual meeting after the forfeiture non-renewal or cesser of the former licence or at the annual meeting at which a renewal of the former licence might have been granted if duly applied for be granted by the Licensing Committee having jurisdiction for the time being in the place where the premises were situated to which the former licence related."

The argument is this. The licence for the Somerset Hotel ceased to exist in 1903. The section therefore applies, and allows one more licence in addition to the existing old Ellesmere licences, and to get this licence the appellant along with others may have his chance.

Now it will be remembered, as already pointed out, that a complete change in the form of the questions put at the licensing poll was introduced in 1910. Prior to that the electors' answer dealt expressly with the number of licences. But when the question took the form of a continuance of licensing in general, obviously something had to be done as to the settlement of number. In 1910 that was done, first of all by s. 5, which stereotyped the number of licences at the number at which they were in a licensing district previous to the poll. It was also done, pleonastically it may be, as to the prohibition part, by s. 30. But in 1918 s. 5 of 1910 was repealed, so that now the only section is s. 30, as amended and quoted above. The sole question therefore is—for the prohibition words are absolute—whether "otherwise ceased to exist" can apply to a ceasing to exist owing to a no-licence vote. Their Lordships are unable to think that they can do so. Their collocation with forfeiture and non-renewal point to something of the same character, i.e., something which had affected the licence in what may be termed its individual existence, not to a general determination affecting many other licences, it might be, besides the one in question. Also the additional words were necessary, for death and bankruptcy are both things that bring a particular licence to an end, and they are not embraced in the words "forfeiture" and "non-renewal." Moreover the references as to when the application should be made seem to indicate that the ceasing to exist is an event happening within the period between the sitting of two licensing committees, not something which happened twenty-five years ago, in the case of which the meeting of the licensing committee in June, 1929, was only the first meeting after the event, because Mid-Canterbury was a non-existent district till just before that date.

This disposes of the case. In respect of the importance attached to it as indicated by the allowance of an appeal to this Board by the Court below, their Lordships have dealt fully with the matter in their own way. But although they must not be taken as agreeing with each and every one of the reasons contained in the separate judgments, some of which are open to criticism, they have not in fact added anything to what has been so well said by the Court of Appeal. Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitors for appellant: *Freshfields, Leese & Munns.*
Solicitors for respondents: *Shaen, Roscoe, Massey & Co.*

[PRIVY COUNCIL.]

S. P. A. ANNAMALAY CHETTY . . . APPELLANT ;

AND

THORNHILL . . . . RESPONDENT.

J. C.*
1931
May 19.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Decree—Finality of Decree—Res judicata—Decree Holder suing on same Cause of Action—Civil Procedure Code (Ord. 2 *of* 1889, *Ceylon), s.* 207.

The appellant sued in Ceylon in the name in which he carried on business to recover from the respondent in respect of money lent, goods delivered, and interest. The respondent pleaded that the appellant could not enforce his rights, as he had not registered his business name, as required by Ord. 6 of 1918. The trial judge made a decree for the sum claimed subject to registration of the business name. Pending the hearing of an appeal the appellant registered his business name, and brought a second suit for the same sum with further interest. The trial judge dismissed the second suit upon the ground that it was barred by the decree in the first. The appeal in the first suit was afterwards allowed, and later an appeal in the second suit was dismissed.

By the Civil Procedure Code, 1889, s. 207, of Ceylon : "All decrees passed by the Court shall, subject to appeal, when an appeal is allowed, be final between the parties ; and no plaintiff shall be non-suited."

Held, that the appellant was entitled to recover the sum claimed, as under s. 207 of the Code no appeal from which an appeal lies and has been taken is final between the parties so as to form res judicata ; and that was inconsistent with the view that the cause of action was merged in the first decree.

Judgment of the Supreme Court of Ceylon reversed.

APPEAL (No. 87 of 1928) from a decree of the Supreme Court of Ceylon (March 13, 1928) affirming a decree of the District Court of Ratnapura (August 31, 1927).

The appeal arose out of a suit brought by the appellant against the respondent on June 2, 1927. The main question upon the present appeal was whether the suit was barred by a decree obtained by the appellant on June 19, 1924, against the respondent on substantially the same cause of action.

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* *Present :* LORD SANKEY, L.C., LORD BLANESBURGH, LORD DARLING, and LORD THANKERTON.

The facts appear from the judgment of the Judicial Committee.

The Supreme Court, affirming the District Court, held that the suit was barred by the earlier decree upon grounds stated in the present judgment, which also sets out the terms of s. 207 of the Civil Procedure Code (Ord. 2 of 1889), of Ceylon, which was material.

1931. April 20. *De Gruyther K.C.* and *Parikh* for the appellant. Upon the true construction of s. 207 of the Civil Procedure Code, 1889, the earlier decree being under appeal was not a final decree; the respondent having appealed from the decree cannot contend that it was final. The decree not being a final decree did not operate as res judicata, nor was there a merger of the cause of action. Further, under the provisions of Ord. 6 of 1918 the earlier decree, obtained by the appellant in the name in which he carried on business, was a nullity. Upon the appeal in the present suit the Court had wide powers, under the Courts Ordinance, 1889, s. 40, to make such order as justice might require, and the appeal should therefore have been allowed. The powers under s. 40 are at least as wide as those of the Court of Appeal in England under Order LVIII., r. 4. Under that rule the House of Lords in *Attorney-General* v. *Birmingham, etc., District Drainage Board* (1) held that the Court of Appeal could make such order as the judge of first instance could have made if the case had been tried at the date when the appeal was heard. When the appeal in the present case was heard there was no longer any earlier decree operating.

H. I. P. Hallett for the respondent. Under the terms of s. 207 of the Code the earlier decree was a final decree unless and until it was set aside or varied upon appeal. The decree being a final decree the second suit was barred both upon general principles and under the express terms of the explanation added to s. 207 by the legislature. In England it is well settled that a judicial decision is final although it is appealable and actually under appeal: *Doe* v. *Wright* (2);

(1) [1912] A. C. 788.

(2) (1839) 10 A. & E. 763, 783.

Harris v. *Willis* (1); *Scott* v. *Pilkington* (2); *Nouvion* v. *Freeman* (3); *Marchioness of Huntly* v. *Gaskell.* (4) It is unlikely that the Ceylon legislature intended to enact a different principle for Ceylon. If a decree were not final when under appeal inconvenience would arise with regard to the execution of a decree afterwards reversed upon appeal. Apart from s. 207 the suit was properly dismissed, because the Court had an inherent power to refuse to entertain a second suit on the same cause of action. The cause of action was merged in the first decree: *King* v. *Hoare* (5); *Scarf* v. *Jardine.* (6) If any hardship arises in this case it is the result of the appellant not taking the proper steps in time to prevent the operation of limitation.

De Gruyther K.C. in reply. The appeal depends upon the effect of s. 207 of the Code, not upon the principles applied in England. The Ceylon legislature may have intended in 1889 to adopt the Indian system, under which it had been held in India that a decree under appeal was not a final decree: *Balkishan* v. *Kishan Lal.* (7) The English decisions as to a cause of action being merged in a judgment depend upon the finality of the judgment, and therefore do not apply if under s. 207 the first decree was not a final decree.

May 19. The judgment of their Lordships was delivered by

LORD THANKERTON. This appeal is from a decree of the Supreme Court of the Island of Ceylon, dated March 13, 1928, confirming a decree of the District Court of Ratnapura, dated August 31, 1927, and made in action No. 4687, in which the appellant is plaintiff, and the only question in the appeal is whether the suit is barred by reason of the proceedings in a former suit by the appellant against the respondent, which was action No. 4122 in the same Court.

Action No. 4122 was instituted by the appellant on June 19, 1924, to recover a balance alleged to be due by the respondent upon a running account in respect of moneys

(1) (1855) 15 C. B. 710, 712, 714.
(2) (1862) 2 B. & S. 11.
(3) (1889) 15 App. Cas. 1.
(4) [1905] 2 Ch. 656, 667.
(5) (1844) 13 M. & W. 494.
(6) (1882) 7 App. Cas. 345, 360.
(7) (1898) I. L. R. 11 All. 148.

advanced and goods sold and delivered, with interest to the date of the suit. The suit was instituted in the name under which the appellant carried on business, and the respondent (inter alia) pleaded that the appellant was precluded from enforcing his rights under the contract set out in the plaint, as he had failed to register his business name as prescribed by the Business Names Registration Ordinance, No. 6 of 1918.

Sect. 9 of that Ordinance provides as follows: "Where any firm or person by this Ordinance required to furnish a statement of particulars or of any change in particulars shall have made default in doing so, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business, in respect of the carrying on of which particulars were required to be furnished, shall not be enforceable at any time while he is in default, by action or other legal proceedings, either in the business name or otherwise."

After protracted procedure in action No. 4122, the District Judge on January 17, 1927, made a decree under which the appellant was ordered to furnish to the registrar within fourteen days from the date thereof the necessary particulars for the registration of his business name, and the respondent was ordered to pay to the appellant, on the latter's compliance with the said order as to registration, the sum of Rs.54,577.46 with interest as prayed for in the plaint, and the respondent was awarded Rs.5000 with interest thereon in satisfaction of his claim in reconvention, and the respondent was ordered to pay the larger part of the costs of the action. On January 19, 1927, the respondent filed an appeal against that decree to the Supreme Court, in which he (inter alia) still maintained his defence founded on the appellant's non-registration of his business name. While this appeal was pending the appellant complied with the requirements of the Business Names Registration Ordinance.

Being faced with the possibility that, if the respondent's appeal succeeded, any further proceedings might be barred by limitation, the appellant made an application to the Supreme Court on March 10, 1927, to advance the hearing of the appeal, which was successfully opposed by the respondent.

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In this situation, the appellant instituted the present suit —action No. 4687—on June 2, 1927, in the District Court of Ratnapura. The amount claimed in the plaint was the same as in action No. 4122, with the addition of further interest. The respondent filed his written answer on July 5, 1927, in which he pleaded (inter alia) as matter of law "that the action No. 4122 of this Court and the decree entered of record therein are a bar to this action." It is unnecessary to detail the manoeuvres of the parties in the procedure which ensued; it is sufficient to state that the appellant unsuccessfully sought to have the trial of the second action adjourned until after the decision of the respondent's appeal in the first action. Issues of law were adjusted in the second action as follows: (1.) Is this action barred by the action No. 4122 of this Court and the final decree entered of record therein? and (2.) Is there a decree that can operate as a bar to the action in decree of Court No. 4122? On August 31, 1927, the District Judge upheld the respondent's plea and dismissed the action (No. 4687). The present appellant appealed from that decree to the Supreme Court on September 8, 1927.

On October 21, 1927, the Supreme Court pronounced judgment in the respondent's appeal in action No. 4122, allowing the appeal and dismissing the action on the sole ground of the present appellant's failure to comply with the requirements of the Registration of Business Names Ordinance.

On March 13, 1928, the Supreme Court delivered judgment on the present appellant's appeal in the second action (No. 4687), dismissing the appeal with costs. This appeal is from that decree, and the only question for their Lordships' decision is whether on June 2, 1927, the appellant was barred from instituting the present suit because he then held the decree of the District Judge in his favour in action No. 4122, though the respondent's appeal therefrom was then pending. The parties in the two suits are the same and the subject-matter may be taken to be the same.

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The District Judge concluded in the respondent's favour on the ground that the decree in action No. 4122, though subject to appeal, was final and enforceable. In the Supreme Court Schneider S.P.J., with whom Lyall-Grant J. agreed, appears to have proceeded on two alternative views—namely, that the present appellant's cause of action had been merged in and superseded by the decree, or otherwise that in both actions the appellant was seeking to recover the same debt, and that, as he could not get decree for the same debt twice over, he was not entitled to maintain the second action at all. The learned judge found it unnecessary to decide a question raised under s. 207 of the Civil Procedure Code of Ceylon, to which their Lordships will now refer.

Sect. 207 of the Civil Procedure Code, 1889, provides as follows: "All decrees passed by the Court shall, subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff shall be non-suited."

The appellant maintained that, under this provision, no decree, from which an appeal lies and has in fact been taken, is final between the parties so as to form res adjudicata, while the respondent contended that such a decree was final between the parties and formed res adjudicata until it was set aside on appeal. In their Lordships' opinion the former view is the correct one, and where an appeal lies the finality of the decree on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form res adjudicata as between the same parties. The opinion of the learned judges of the Supreme Court clearly inclined to the same view, and their Lordships have a difficulty in appreciating why the learned judges found it unnecessary to decide this point, for this view still leaves it open to the Court to see that the appellant does not get decree twice over for the same sum, and it is inconsistent with the other ground expressed by them for their decision that the appellant's cause of action had been merged into the decree in action No. 4122, since, according to this view, that decree was not final. Their Lordships regret that the second action was not adjourned pending the decision of the appeal in the first action, as that would have simplified procedure and saved expense.

Accordingly, their Lordships are of opinion that the appeal should be allowed and that the decree of the District Judge, dated August 31, 1927, and the decree of the Supreme Court on that judgment, dated March 13, 1928, should be recalled, the appellant to have the costs of this appeal, except the costs of his petition for the admission of additional documents, in relation to which the respondent should have his costs, and as to which there should be a set-off, that the appellant should have his costs in relation to the issues of law on which the decree of August 31, 1927, was pronounced, and of the appeal from that decree to the Supreme Court, and that the action should be remitted to the District Court of Ratnapura to proceed as accords. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Stephenson, Harwood & Tatham.*
Solicitor for respondent: *O. A. Cayley.*

[PRIVY COUNCIL.]

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May 19.

ROBINSON . . . . APPELLANT;

AND

STATE OF SOUTH AUSTRALIA [No. 2] . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

South Australia—Practice—Production of Documents—Action against State—Official Documents—Privilege—Alleged Prejudice to Public Interests—Power of Court to inspect—South Australian Rules of Court, Order XXXI., *r.* 14, *sub-r.* 2.

Order XXXI., r. 14, sub-r. 2, of the South Australian Rules of Court—which (like Order XXXI., r. 19A, sub-r. 2, of the English rules) provides that where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a judge to inspect it for the purpose of deciding as to the validity of the claim—applies where privilege is claimed for an official document on the ground that its disclosure would be contrary to the interests of the public, even though the claim is supported by a statement to that effect by the Minister responsible. The Court has always had in reserve the power to inquire into the nature of the document for which protection is so sought, and to require some indication of the injury which would result from its production.

When a State, being a party to litigation and bound to give discovery, claims privilege for documents upon the ground above stated, the claim should be made under oath by a responsible Minister whose mind has been directed to the material question. A claim to protection in the case of documents relating to the trading, commercial or contractual activities of a State can rarely be sustained, especially in time of peace. That documents would prejudice the case of the State in the litigation, or assist the other party, is a compelling reason for their production only to be overborne by the gravest reasons of State policy or security.

The appellant brought an action in the Supreme Court of South Australia against the respondent State claiming damages for alleged negligence in the care of wheat placed in the control of the State under the Wheat Harvest Acts, 1915–17. Upon an order for discovery the respondent State, by an affidavit made by a civil servant, claimed privilege in respect of 1892 documents tied in three bundles, and stated to be State documents, comprising communications between officers administering the department concerned; there was exhibited to the affidavit a minute by the responsible Minister stating (inter alia) that disclosure of the documents would be contrary to the interests of the State and of the public:—

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* *Present:* LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

Held, that the minute was inadequate to support the claim of privilege, as it was too vague in the circumstances of the case, and was not a statement on oath showing that the Minister had himself considered each of the documents, or indicating the nature of the suggested injury to the interests of the public; and that the Supreme Court should exercise its power under Order XXXI., r. 14, sub-r. 2, to inspect the documents, that course being less likely to cause delay than an order for a further and better affidavit of documents.

Griffin v. *State of South Australia* (1925) 36 C. L. R. 378 disapproved. Judgment of the Supreme Court of South Australia reversed.

APPEAL (No. 47 of 1930) by special leave from an interlocutory order of the Supreme Court of South Australia (November 28, 1929) dismissing the application of the appellant for an order for inspection of documents.

On February 3, 1927, the appellant brought an action in the Supreme Court of South Australia against the respondent State claiming damages for alleged negligence on the part of the State, its servants, and agents, in handling, storing and selling wheat delivered to the State pursuant to the Wheat Harvest Acts, 1915–1917, of South Australia. Upon a preliminary point of law the Supreme Court held that the action could not be maintained, but that decision was reversed on appeal to the Privy Council and the action remitted for trial; the appeal is reported at [1929] A. C. 469.

On July 29, 1929, an order was made for discovery by the respondent limited to specified classes of documents. In pursuance of the order an affidavit was made by a civil servant in charge, on behalf of the Minister administering the Wheat Harvest Acts, of the documents referred to in the order; there was exhibited to the affidavit a minute signed by the Minister responsible, the department having been dissolved. The affidavit and the minute objected to the production or disclosure of 1892 numbered documents in three bundles, a letter marked "C," and minutes in a book marked "G," upon the grounds that they were State documents consisting of communications between officers administering a department of State in the course of their official duties, and that their disclosure would be contrary to the interests of the State and of the public. The contents of the affidavit and minute and the circumstances of the case appear fully from the judgment of the Judicial Committee. In addition to the documents for which privilege was claimed by the affidavit of documents there were disclosed a large number of documents for which privilege was not claimed; these included 1406 letters between the Government and its agents and others relating to the condition of the wheat and its reconditioning.

An application by the appellant for an order to inspect and take copies of the documents for which privilege was claimed was referred to the Full Court of the Supreme Court. The Court, following the decision of the majority of the High Court of Australia in *Griffin* v. *State of South Australia* (1), dismissed the application.

The Commonwealth Judiciary Act, 1903–1910, provides as follows: s. 58, " Any person making any claim against a State, whether in contract or in tort, in respect of a matter in which the High Court has original jurisdiction or can have original jurisdiction conferred on it, may in respect of the claim bring a suit against the State in the Supreme Court of the State, or (if the High Court has original jurisdiction in the matter) in the High Court"; s. 64, " In any suit to which the Commonwealth or a State is a party, the rights of the parties shall as nearly as possible be the same, and judgments may be given and costs awarded on either side, as in a suit between subject and subject."

Order XXXI., r. 14, sub-r. 2, of the South Australian Rules of Court was stated to be in the same terms as Order XXXI., r. 19A, sub-r. 2, of the rules of the English Supreme Court, which provides: " Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a judge to inspect the documents for the purpose of deciding as to the validity of the claim to privilege."

1931. Jan. 26, 27, 29, 30. *Spens K.C.* and *J. H. Stamp* for the appellant. The plaintiff was entitled to discovery by

(1) 36 C. L. R. 378.

the respondent State, subject to any claim of privilege in respect of particular documents: *Griffin* v. *State of South Australia* (1); *Jamieson* v. *Downie.* (2) The decision of the majority of the Higher Court of Australia at a later stage in *Griffin* v. *State of South Australia* (3), followed in this case, was erroneous. The appellant relies upon the dissenting judgment of Starke J. Privilege does not attach to a document merely because it is a State or official document, but only if its disclosure would be contrary to the interests of the public; the prerogative right is to be distinguished from the evidence showing that it arises in a particular case. Having regard to the extension of the commercial activities of governments, and in Australia the power of the subject to sue a State, it is of great importance that the Court should be able to satisfy itself that a claim of privilege on this ground is justified. Order XXXI., r. 14, sub-r. 2, of the South Australian Rules of Court, like Order XXXI., r. 19A, sub-r. 2, of the English rules, gives the Court or a judge the right to inspect a document for which privilege is claimed. The rule contains no exception as to this particular privilege, and there is no ground for excluding it. Although in many cases the Court has accepted the statement of the head of the department concerned, the Court has never "abdicated the duty" to satisfy itself that the claim is justified: per Griffith C.J., Barton J. agreeing, in *Marconi's Wireless Telegraph Co.* v. *The Commonwealth* [*No.* 2]. (4) In *Queensland Pine Co.* v. *The Commonwealth of Australia* (5) the Court inspected the documents there in question and rejected the claim of privilege, in spite of the statement of a Commonwealth Minister. Those decisions accord with the practice in England: *Hennessy* v. *Wright* (6); *In re Joseph Hargreaves, Ld.* (7); *Asiatic Petroleum Co.* v. *Anglo-Persian Oil Co.* (8) In *Ehrmann* v. *Ehrmann* (9) it was held that the English rule of Court

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(1) (1924) 35 C. L. R. 200.
(2) [1923] A. C. 691.
(3) 36 C. L. R. 378.
(4) (1913) 16 C. L. R. 178, 186.
(5) 1920 St. R. Qd. 121.
(6) (1888) 21 Q. B. D. 509, 515.
(7) [1900] 1 Ch. 347.
(8) [1916] 1 K. B. 822, 826, 830.
(9) [1896] 2 Ch. 826.

applied to every kind of privilege from production, though this particular privilege was not there in question. In *Admiralty Commissioners* v. *Aberdeen Steam Trawling and Fishing Co.* (1) the Court of Session in Scotland upheld the view that the statement of the head of a department was conclusive. But in the earlier Scotch decision, *Sheridan* v. *Peel* (2), and the later, *Henderson* v. *M'Gown* (3), it was recognized that the Court had power to inspect the document where it was not satisfied. It was suggested in *Ankin* v. *L. and N. E. Ry. Co.* (4) that the practice in Scotland differed from that in England.

[LORD THANKERTON. I know of no difference.]

In the cases, of which *Beatson* v. *Skene* (5) is typical, where the statement was held to be conclusive, the question arose upon a subpoena duces tecum, and as Pollock C.B. points out, the Court could not examine the validity of the claim in secret. The Chief Baron, agreeing with Martin B., expressly says that there may be extreme cases in which a judge might well ask for a document in spite of the reluctance to produce it. Moreover, the decision was before the present extension in the commercial activities of governments. Further, where the rule has been applied the nature of the document has been apparent. [Reference was made also to *Moodalay* v. *Morton* (6); *Smith* v. *East India Co.* (7); and *Wadeer* v. *East India Co.* (8)]

In the present case the affidavit and minute were inadequate to establish the claim to privilege. No indication was given of the nature of the 1892 documents. The known circumstances of the case, documents disclosed, and published State papers, show that some at least of the undisclosed documents related solely to the condition of the wheat. No public interest in the true sense could be adversely affected by disclosures of documents of that kind. Undue weight should not be attached to a vague objection as to public security as against the rights of the plaintiff: *Food Controller* v. *Cork.* (1) The statement of the Minister should show, and does not, that he has brought his mind to bear upon the question whether disclosure of documents of a specified class would be contrary to the interests of the public: *Kain* v. *Farrer.* (2) The appellant is entitled to a further and better affidavit of documents; alternatively, the Supreme Court should exercise its power under Order XXXI., r. 14, sub-r. 2.

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(1) 1909 S. C. 335.
(2) 1907 S. C. 577, 580.
(3) 1916 S. C. 821.
(4) [1930] 1 K. B. 527, 533.
(5) (1860) 5 H. & N. 838.
(6) (1785) 1 Bro. Ch. 468.
(7) (1841) 1 Ph. 50.
(8) (1856) 8 D. M. & G. 182; S. C. 25 L. J. (Ch.) 345.

Sir Boyd Merriman K.C. and *Sir Robert Aske* for the respondent State. Under s. 64 of the Judiciary Act the rights of the plaintiff are to be "as nearly as possible" the same as if he was suing a subject. That limitation preserves the right of a State to claim privilege in respect of documents the disclosure of which would be contrary to the interest of the public: *Jamieson* v. *Downie.* (3) The principle laid down by the Court of King's Bench in *Beatson* v. *Skene* (4), that the statement of the head of a department that production would be contrary to the public interest is conclusive, has been followed in numerous cases. The Court has not, like the Minister, such knowledge of the circumstances as enables it to decide the matter. As Esher M.R. said in *Hughes* v. *Vargas* (5), "it is not for the judge to say whether disclosure is contrary to the public interest." A single sentence in a document may bring the whole document within the privilege: *Anderson* v. *Hamilton* (6); *Stace* v. *Griffith* (7); *Chatterton* v. *Secretary of State for India.* (8) The principle has been considered and applied as recently as 1930 by the Court of Appeal in *Ankin* v. *L. and N. E. Ry. Co.* (9) Although cases referred to by the appellant show that the Court has in some cases inspected the document they do not establish a practice overriding the principle so laid down. The principle exists still in spite of the rule of Court. The affidavit and minute in this case were sufficient to establish the privilege claimed. The form was that which is usual: Robertson's Civil

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(1) [1923] A. C. 647, 666.
(2) (1877) 37 L. T. 469.
(3) [1923] A. C. 691, 694.
(4) (1860) 5 H. & N. 838.
(5) (1894) 9 R. 661, 664.
(6) (1816) 2 Brod. & B. 156*n*.
(7) (1869) L. R. 2 P. C. 420, 428.
(8) [1895] 2 Q. B. 189, 193.
(9) [1930] 1 K. B. 527.

Proceedings by and against the Crown, p. 635. It is not permissible to contend in the face of the statement that some particular document or class of documents must be among those for which privilege is claimed: *Ankin's* case. (1)

Spens K.C. replied.

May 19. The judgment of their Lordships was delivered by

Lord Blanesburgh. There is now in Australia a concourse of claimants seeking to establish against the State of South Australia a liability to them individually for the alleged negligence of its servants and agents in the execution of the duties of Government under the Wheat Harvest Acts, 1915–17.

Under these Acts a wheat marketing scheme was established, the substance of which was that all growers in South Australia had to deliver their wheat to the Government, which assumed the duty of accepting and marketing it and distributing the net proceeds among the growers or their assigns in proportion to the quantities of wheat delivered. In the case of *Welden* v. *Smith* (2) it was contended by the State that the Wheat Harvest Acts involved on behalf of Government political rather than trading operations and responsibilities. But that contention was not accepted by this Board, which adopted the view that under these Acts the State was, in effect, carrying on the business of marketing and selling the wheat of those who supplied it, and that Government at the suit of wheat growers who delivered wheat under the scheme could not be held liable for proved negligence in the performance of the duties so assumed by it. It has also been determined by this Board, on the hearing of a preliminary point of law in the present action (3), that that liability extends to a claimant with a derivative title only: that is to say, to one like the present plaintiff-appellant, who is merely an assignee of the rights of divers wheat growers under the scheme. In this action the appellant's

(1) [1930] 1 K. B. 534.
(2) [1924] A. C. 484.
(3) [1929] A. C. 469.

claim in that character is to establish the liability of the respondent State for loss of wheat of the 1916–17 harvest by exposure to water and to the ravages of mice while in its custody or that of its agents for the purposes of the wheat marketing scheme, all on the footing that such loss was attributable to negligence on the part of such agents. The preliminary question having been decided in his favour it remains for the appellant to quantify his loss and to establish, if he can, as a matter of fact, that such loss was due to negligence for which the respondent State is responsible.

The action is one of a large number now pending, claiming similar relief against the State, all being alike dependent for success upon the establishment of the same facts. In no action, however, has any attempt yet been made to establish these facts. The two earlier actions, Welden *v.* Smith, already referred to, and Griffin *v.* State of South Australia, have both been discontinued. The present appellant gives the reason. The facts are mainly in possession of the respondent State actually responsible for the working of the scheme. Without the assistance, unobtained in either action, of complete discovery from the respondent the establishment of the necessary facts by either plaintiff was not practicable.

The appellant, indeed, as the result of this experience, now avows that no action brought to establish the liability of the State in this matter stands any real chance of success unless, like any other litigant under alleged liability in respect of trading operations, the State can be required to make full discovery of all documents in its possession or power relative to the matters in controversy. Full discovery by the respondent has, in other words, now become the immediately vital issue between the parties. The recognition by both sides of its importance is a more than sufficient explanation of the persistent attempts on the part of the different plaintiffs to obtain such discovery and for the equally determined resolve on the part of the State to withhold it.

In relation to this question of discovery some account of the two earlier actions will not, here, be out of place. In

Welden *v.* Smith, commenced in 1921, the defendant was a nominee of the respondent State, sued on its behalf in its Supreme Court, pursuant to Ordinance No. 6 of 1853. The preliminary judgment of the Board therein has already been referred to. At a later stage of the action the plaintiff accepted the position that in a suit so framed no discovery at all was obtainable from the defendant, and as none was offered by Government the plaintiff, for lack of sufficient evidence of his own to support it, eventually discontinued the action altogether.

In 1924 the second action, Griffin *v.* State of South Australia, was commenced, this time in the High Court of Australia. It was brought against the respondent State in its own name pursuant to ss. 58 and 64 of the Judiciary Act. In that action the State, the actual defendant, raised the contention that there again it could not be ordered to make any discovery to the plaintiff. But that contention was rejected by the High Court of Australia (1), and the respondent State was directed to make discovery, by an order special in form and in terms identical with that now under review. In compliance with that order the State filed an affidavit by which privilege was claimed for certain of the documents scheduled to it, and on an application by the plaintiff for production of these documents the State's claim of privilege in respect of them was upheld by a majority of the High Court, and was given effect to by its order of October 29, 1925. The documents for which privilege was thus successfully set up included, as the then plaintiff believed, documents vital to the establishment of his case. These withheld, proof of the necessary facts again became impracticable, and Griffin's action, like Welden *v.* Smith, was discontinued before trial.

The plaintiff Welden, and the plaintiff Griffin, were each of them original owners of wheat. It was desired on behalf of the general body of claimants to test the question, whether the State's liability to owners, already established in Welden *v.* Smith, extended to, and could be enforced by, a plaintiff

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(1) 35 C. L. R. 200.

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with a derivative title only. Hence the present action, commenced on February 2, 1927, in the Supreme Court of South Australia, in which, as already stated, the liability of the respondent State to the appellant suing under such a title has been established.

But the action was brought for the further purpose of having it determined therein by the final decision of His Majesty in Council whether the claim of privilege upheld in Griffin's action was really justifiable, and such is the question involved in the present appeal, which, while in effect an appeal from the majority decision of the High Court of Australia in Griffin's action is, in form, an appeal from an order of the Supreme Court of South Australia, made in this suit on November 26, 1929, by which, in terms identical with the order in Griffin's action, that Court, without argument, has again sustained the respondent's claim of privilege. The claim, thus twice upheld, is made in respect of a large number of documents, said to be State documents, the disclosure of which, it is alleged, would be contrary to public policy and the interests of the State. The real question now to be settled is whether this claim, without any qualification whatever, is one which in all the circumstances of this case ought to have been, as it has been, accepted.

The vital importance to the plaintiff of the question has already been made apparent. It will be found to be hardly less important to those who, whether in South Australia or elsewhere, find themselves engaged in litigation with Governments in respect of what, as between individuals, would be ordinary mercantile transactions. That State documents are frequently absolutely privileged from production was, of course, not disputed by the appellant, nor was the supreme duty of the Court to protect the privilege where it exists in any way canvassed. The effort of learned counsel for the appellant was to define the limits of the protection and to show that it did not, at least in hoc statu, extend completely to shield the documents now in question. It will be found convenient as an introduction to a closer examination of the facts and circumstances of the present case to make some inquiry as to the character and quality of the privilege itself and as to the attitude of the Court with reference to it when its possible existence in relation to documents comes under judicial notice.

And, first of all, it is, their Lordships think, now recognized that the privilege is a narrow one, most sparingly to be exercised. "The principle of the rule," Taylor points out in his work on Evidence, section 939, "is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires."

It is perhaps matter for surprise that the cases illustrating the limitations upon a rule so circumscribed are not more numerous. But their Lordships cannot doubt that the explanation is to be found in the judgment of Rigby L.J. in *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (1), where, himself an ex-law officer, he says: "I know that there has always been the utmost care to give a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded."

As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production: see *Asiatic Petroleum Co.* v. *Anglo-Persian Oil Co.* (2) and *Smith* v. *East India Co.* (3)

A contrast, very apposite in the present case, between State documents which are readily within the rule and other documents of the same State which, presumably, are outside it, is drawn in the case of *Wadeer* v. *East India Co.* (4), so frequently cited from another angle. Turner L.J., in the course of his judgment there, says: "My learned brother has already read . . . . the passages contained in the answers with reference to the nature of the documents now sought to be protected. It is sufficient to say, that they are stated . . . . to be political communications, which, in fulfilment of the public political duties of the East India Company and of their several Governments in India, have passed between them and their Governments respectively, solely with a view to the good government of India and to the performance of a public duty. The question which has been suggested in the argument as to contracts between the East India Company and any railway subscribers with reference to the formation of a railway has nothing to do with a question relating to the public government of India and the performance of the public duty of the Company. To such a question it is unnecessary to refer, because it is perfectly distinguishable from that before the Court."

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(1) [1897] 2 Q. B. 384, 395.

(2) [1916] 1 K. B. 822, 829, 830.

(3) 1 Ph. 50.

(4) 8 D. M. & G. 182, 189.

It must not be assumed from these observations of the Lord Justice that documents relating to the trading, commercial or contractual activities of a State can never be claimed to be protected under this head of privilege. It is conceivable that even in connection with the production of such documents there may be "some plain overruling principle of public interest concerned which cannot be disregarded." But the cases in which this is so must, in view of the sole object of the privilege, and especially in time of peace, be rare indeed, and the distinction drawn by the Lord Justice remains instructive and illuminating. In view of the increasing extension of State activities into the spheres of trading business and commerce, and of the claim of privilege in relation to liabilities arising therefrom now apparently freely put forward, his observations stand on record to remind the Courts, that while they must duly safeguard genuine public interests they must see to it that the scope of the admitted privilege is not, in such litigation, extended. Particularly must it be remembered in this connection that the fact that production of the documents might in the particular litigation prejudice the Crown's own case or assist that of the other side is no such "plain overruling principle of public interest" as to justify any claim of privilege. The zealous champion of Crown rights may frequently be tempted to take the opposite view, particularly in cases where the claim against the Crown seems to him to be harsh or unfair. But such an opposite view is without justification. In truth the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security. As was pointed out by Lord Buckmaster in delivering the judgment of this Board in *Esquimalt and Nanaimo Ry. Co.* v. *Wilson* (1) Baron Atkyns's often cited observations in *Pawlett* v. *Attorney-General* (2) are based upon general principles: "'The party ought in this case,' said Baron Atkyns there, 'to be relieved against the King, because the King is the fountain and head of justice and equity, and it shall not be presumed that he will be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him.'"

The power of the Court to call for the production of documents for which this privilege is claimed and to determine the validity of the claim for itself was much discussed in argument. The result of the discussion has been, as their Lordships think, to confirm the view of Griffiths C.J. in *Marconi's Wireless Telegraph Co.* v. *The Commonwealth* [*No.* 2] (3), where in effect he concludes that the Court has in these cases always had in reserve the power to inquire into the nature of the document for which protection is sought, and to require some indication of the nature of the injury to the State which would follow its production. The existence of such a power is in no way out of harmony with the reason for the privilege provided that its exercise be carefully guarded so as not to occasion to the State the mischief which the privilege, where it exists, is designed to guard against.

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(1) [1920] A. C. 358, 366. (2) (1667) Hardres, 465, 469.
(3) 16 C. L. R. 178.

In the time of *Beatson* v. *Skene* (1) any examination of a document would apparently have had to take place in public, and the mischief resulting from such publicity is the reason given by the Chief Baron for his acceptance there of the Minister's word without making it. The conclusive result of the Minister's statement is, however, emphasized by Lord Dunedin in *Admiralty Commissioners* v. *Aberdeen Steam Trawling and Fishing Co.* (2) The existence of the power, nevertheless, is affirmed and its exercise encouraged in the later Scotch case of *Henderson* v. *M'Gown* (3), and is confirmed, not only by judicial pronouncement, but by widespread practice, and, may it not be added, by the reason of the thing? Lindley M.R., for example, in the case *In re Joseph Hargreaves, Ld.* (4), was not prepared to set any limit to the power of the Court to call for production of a document for which this privilege is claimed. The propriety of Field J.'s own practice in the matter, as described by him in *Hennessy* v. *Wright* (5), has, pace the observations upon it of Isaacs J., in *Griffin's* case, not been challenged, and, hitherto, it has usually been in cases where the State was not itself a party litigant that the difficulty has been suggested. Where, as in the present case, the State is not only sued as defendant under the authority of statute, but is in the suit bound to give discovery, there seems little, if any, reason why the Court in relation to this privileged class of its documents, should have any less power than it has to inspect any other privileged class of its documents, provided, of course, that such power be exercised so as not to destroy the protection of the privilege in any case in which it is found to exist. But to this matter their Lordships will return at a later stage of this judgment.

Upon one further general question the result of the authorities is, their Lordships think, not doubtful. The Court is entitled to prescribe in any particular case the manner in which the claim of privilege shall be made if the claim is to be allowed. It may, in one case, if thus advised, accept the unsworn statement of a responsible Minister. It may, in another case where the circumstances seem so to require, call for an affidavit from him. The Court did so in *Kain* v. *Farrer* (1), holding that it was not enough there to state in a mere formal affidavit that discovery was objected to on the ground of public policy, but that it ought to appear that the mind of a responsible Minister had been brought to bear on the question of the expediency in the public interest of giving or refusing the information asked for, and Lord Coleridge insisted on an affidavit being produced from the President of the Board of Trade himself. In the present case their Lordships are not required to make upon this subject any pronouncement as to the proper practice in cases in which the Crown is not a party litigant and not liable to give discovery. The Board is concerned now only with a case where the State is party litigant and bound to give discovery. In such a case it seems to their Lordships clear that this particular privilege should normally, like any other, be claimed under the sanction of an oath, the oath being that of a responsible Minister of State whose mind has been directed to the question. Their Lordships, in saying this, do not of course mean to suggest that this requirement has come to be called for as a protection against imposition. Nothing of the sort. But it is required as a guarantee that the statement and opinion of the Minister, which the Court is asked to accept, is one that has not been expressed inadvisedly or lightly or as a matter of mere departmental routine, but is one put forward with the solemnity necessarily attaching to a sworn statement. Lastly, the privilege, the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published.

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(1) 5 H. & N. 838.

(2) 1909 S. C. 335.

(3) 1916 S. C. 821.

(4) [1900] 1 Ch. 347.

(5) 21 Q. B. D. 509.

Their Lordships, with these general considerations in mind, may now proceed to a consideration of the claim of privilege actually set up here, reviewing at the same time the circumstances in which it has been put forward.

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(1) 37 L. T. 469.

The order for discovery in the action was made on July 29, 1929. It required the respondent State to discover on oath the documents which were, or had been, in its possession or power relating to any matters in question in the action; limited, however, to documents falling within sixteen particular descriptions specified. The order, which in its terms is identical with that in Griffin's action, has the appearance of being, and doubtless was, an arranged one made upon the footing that documents of the sixteen specified descriptions were, or had been, in the possession of the State, and limiting the discovery to them so as to relieve the State of the impossible burden in transactions so vast of an order for discovery in the usual comprehensive form.

Six of the sixteen sets of documents so particularized are the following: "(1.) Reports of inspectors employed by the defendant relating to the wheat of the 1916–17 harvest. (2.) Correspondence between the defendant, including the Wheat Scheme and Wheat Harvest Board, and such inspectors in respect of the said wheat. (7.) Minutes of the Wheat Advisory Committee. (12.) Correspondence between the manager of the Wheat Scheme and W. W. Hutton. (13.) Letters from Clarence Goode, then Minister of Agriculture, to Messrs. F. A. Verco, E. A. Badcock, W. M. Alford, C. J. Smith and G. G. Nicholls, written in or about June, 1917. (15.) Letters from one David Kelly to the manager of the Wheat Harvest Board, written in or about the month of February, 1917."

The affidavit of documents in obedience to that order was sworn on November 6, 1929, by one William Lyle Shegog, described as the civil servant in charge on behalf of the Minister administering the Wheat Harvest Acts, 1915–17, of the documents referred to in the order. The Wheat Harvest Board itself, as the affidavit states, had by that time been disbanded. The affidavit then discloses in the second part of its first schedule a vast collection of documents by descriptions corresponding with the remaining ten classes specified in the order for discovery, but making no reference whatever to any of the six classes just particularized. These documents are accounted for in the affidavit only, if at all, by documents included and referred to in the first part of the schedule as follows: "Documents tied up in three bundles, the first marked 'A' and numbered 1–440 inclusive; the second marked 'B (1.)' and numbered 1–1041 inclusive; and the third marked 'B (2.)' and numbered 1–411 inclusive. A letter marked 'C.' Minutes contained in a book marked 'G.'"

No description of these documents is, it will be seen, there given, but Mr. Shegog, in the body of the affidavit, states, with reference to them, that they are: "State documents and consist of communications relating to a department of the Government of the State of South Australia passing between the officers of the said department relating to the affairs of such department of State, and made by officers of State to other officers of State in the course of their official duty and in the course of official communications between them on matters of public business and relating solely to the official administration of the said department. I have caused the said documents to be submitted to the Hon. Herman Homburg, the Minister in charge of the said department and he has directed me to object to produce the same," by a minute which Mr. Shegog exhibits to his affidavit.

That minute, a document of the first importance in the case, is in the following terms:—

"*Re Robinson* v. *State of South Australia, Supreme Court, Action No.* 50 *of* 1927.

I have considered the documents in your custody relating to the affairs of the South Australian Wheat Harvest Board, such documents being the documents tied up in three bundles, the first marked A' and numbered 1–440 inclusive, the second marked 'B (1.)' and numbered 1–1041 inclusive, and the third marked 'B (2.)' and numbered 1–411 inclusive; a letter marked 'C'; and minutes contained in a book marked 'G.'

The said documents are State documents and are communications relating to a department of the Government of the State of South Australia passing between the officers of the said department relating to the affairs of such department of State and made by officers of State to other officers of State in the course of their official duty. I direct you that the disclosure of the said documents (including the said minute book) is contrary to public policy, and that the interests of the State and of the public service and the public interest will be prejudiced by the production of the said documents and I direct you not to produce or disclose the said documents or the said minute book to any person or persons.

The above direction is not based in any way upon the pecuniary or commercial interests of the said department or of the State of South Australia or of the plaintiff, or upon any desire to defeat the plaintiff's claim in the said action, but solely upon and in the interests of the public welfare and the public service.

Dated the 25th day of October, 1929.

H. HOMBURG,
Attorney-General and Minister for Wheat."

Now with reference to this minute it must be noticed first, that it is in terms almost identical and in its effect quite identical with the minute dated August 1, 1925, made for the purpose of Griffin's action by the then Minister, Mr. W. J. Denny; that the documents described by each Minister in terms of the vaguest generality are no fewer than 1894 in number; and that each Minister has "considered" them—a word which may mean anything or nothing in relation to such a mass of papers. The Minister, it will be seen, does not by the memorandum commit himself in terms to the statement that the ground on which the direction is given by him represents his own conviction or belief, while the last paragraph indicates in no uncertain terms that while the Minister's direction is not based upon any such grounds the pecuniary and commercial interests of his department and the State of South Australia and of the plaintiff may be affected by the withholding of the documents, and the plaintiff's claim be thereby defeated.

Now their Lordships cannot refrain from expressing surprise that the complete insufficiency of this claim for protection as so made, has not been matter of judicial observation, either in Griffin's action or in this. To their minds, as a claim for such protection this minute is entirely inadequate. If it may be assumed that it includes the documents particularized as above stated, and not elsewhere referred to in the affidavit, it should have dealt with these documents specifically and not under a vague and as applied, at all events, to some of them, a most inapt description. It should have appeared that the Minister had not merely "considered" this mass of documents, but that he had read and considered each of them. In view specially of the fact that the documents are primarily commercial documents, he should have condescended upon some explanation of the particular and far from obvious danger or detriment to which the State would be exposed by their production. Above all, and especially in view of the last paragraph of the minute, the claim was one which should have been put forward under the sanction of an oath by some responsible Minister or State official. Their Lordships do not hesitate to say that both in Griffin's action and in this the claim of privilege as actually put forward should have been rejected as entirely inadequate.

But the privilege has not, in their Lordships' judgment, been lost merely by the insufficiency of the form in which it has been claimed. It is quite possible that there may be amongst the scheduled documents some, at least, to which the privilege genuinely attaches, and to throw open these documents to the inspection of the plaintiff, without more, would destroy the protection of the privilege. Therefore it would or might be contrary to the public interest to deprive the respondent State of a further opportunity of regularizing its claim to protection, by producing as its next step an affidavit of the description already indicated.

And that the respondent State should now be given that opportunity would, on proper terms as to costs, have been their Lordships' advice had it not been that such a course would necessarily involve further serious delay, without, it may be, advancing any further the final solution of the question at issue. There is, moreover, another course open which, in the circumstances, seems to their Lordships to be in every way preferable—namely, to remit the case to the Supreme Court of South Australia with a direction that it is a proper one for the exercise by that Court of its power of itself inspecting the documents for which privilege is set up in order to see whether the claim is justified.

Their Lordships have already given reasons for their conclusion that the Court is possessed of such a power. In the case of the Supreme Court, under the South Australian Rules of Court Order XXXI., r. 14, sub-r. 2, the power is conferred in terms express. The order, which is in the same form as Order XXXI., r. 19A, sub-r. 2, of the rules of the English Supreme Court, is to the effect that where on an application for an order for inspection, privilege is claimed for any document, it shall be lawful for the Court or a judge to inspect the document for the purpose of deciding as to the validity of the claim. Their Lordships see no reason why the particular privilege now in question should be excluded from the connotation of the word as there used. They see no reason why in South Australia any more than in England the word should be construed in a narrow sense—and as to England see *Ehrmann* v. *Ehrmann*. (1) Documents in respect of which such privilege was claimed were inspected by Scrutton J. in *Asiatic Petroleum Co., Ld.* v. *Anglo-Persian Oil Co.* (2) It has been suggested that the inspection was there made by consent, but their Lordships find no warrant in the report for that conclusion. There is a precedent for it in Queensland, to which their Lordships will later refer, and with reference to the whole matter they are much impressed by the observations of Starke J. in his dissenting judgment in *Griffin's* case (3), in the course of which he says, speaking of the papers now again in question: "No one has suggested that the interests of the public are such that a judge ought not to see the documents."

But the exercise of the power in the present case is especially appropriate, seeing that the documents have come into existence with reference to the commercial activities of the State, and that they are the documents of a

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(1) [1896] 2 Ch. 826.
(2) [1916] 1 K. B. 822.
(3) 36 C. L. R. 378, 402.

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department of State which has now been disbanded, and their Lordships recall the passage already cited from the judgment of Turner L.J. in *Wadeer* v. *East India Co.* (1) and the speech of Lord Shaw of Dunfermline in *Food Controller* v. *Cork.* (2)

In these circumstances it only remains to consider whether the circumstances here are such that the power should now be exercised. Their Lordships feel satisfied that its exercise is called for. They need only in justification refer, out of all the documents, to the reports of the inspectors under the scheme, the first documents specified in the order for discovery. These reports have not been discovered by the respondent. If they are not excluded from the affidavit altogether they are included amongst the documents for which privilege is claimed. It cannot be doubted that they were at one time in the possession of the respondent State, that they remain in its custody or power cannot, their Lordships think, be open to serious question when regard is had to the references made to them in documents which are disclosed, and to the letter of July 5, 1924, from the solicitors for the nominal defendant in Welden *v.* Smith—being the solicitors for the State in this action to the solicitors for the plaintiff in that action, being the solicitors for the appellant. The letter is to be found in the record at p. 29, and seems to their Lordships, unexplained, to be conclusive on this point. Now these reports are not only relevant to the issue between the parties ; they are vital to the plaintiff's case. With reference to them Starke J. says in his judgment already quoted from (3) : " None of these reports have been produced for inspection, and all are obviously covered by the objection that their production and inspection would be prejudicial to the public interest. In the fact of the relationship of the Government to the owners of the wheat delivered to it, and the correspondence which the Government has produced, the Minister's statement is, to me, quite inexplicable. I am not prepared to say that the statement is wrong, but I strongly suspect that he has misconceived the position."

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(1) 8 D. M. & G. 182.

(2) [1923] A. C. 647, 668.

(3) 36 C. L. R. 378, 402.

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That also is the present state of mind of their Lordships, and it appears to them that with regard to all the documents the real position will best be ascertained by the exercise by the Court of the powers conferred upon it by the order, already stated.

There is for this course what seems to the Board to be in principle a satisfactory precedent in Queensland in the case of the *Queensland Pine Co.* v. *The Commonwealth of Australia* (1) where, notwithstanding a certificate from the Minister of State of the Commonwealth claiming protection for documents on this occasion in terms direct and unambiguous, the learned judge at the trial inspected them, and having done so expressed the opinion that the facts discoverable by inspection would not be detrimental or prejudicial to the public welfare, and he ordered that inspection of all the documents should be given to the plaintiff. The jurisdiction was there exercised at the trial: their Lordships see no reason why it should not, equally safely, be exercised on interlocutory application. Their Lordships need hardly add that the judge in giving his decision as to any document will be careful to safeguard the interest of the State, and will not, in any case of doubt, resolve the doubt against the State without further inquiry from the Minister.

Their Lordships accordingly will humbly advise His Majesty to discharge the order appealed from and to remit the case to the Supreme Court of South Australia with a direction that it is one proper for the exercise of the Court's power of inspecting the documents for which privilege is claimed in order to determine whether the facts discoverable by their production would be prejudicial or detrimental to the public welfare in any justifiable sense. The appellant will have the costs of this appeal. The costs below of both parties will be costs in the action.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth.*

Solicitors for respondents: *Sutton, Ommanney & Oliver.*

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(1) 1920 St. R. Qd. 121.

[HOUSE OF LORDS.]

H. L. (E.)* LOUIS DREYFUS AND COMPANY . . APPELLANTS;

1931

June 26.

AND

TEMPUS SHIPPING COMPANY . . . RESPONDENTS.

Shipping—General Average—Charterparty—Bill of Lading—Fire on Board Ship—Warranty of Seaworthiness—Damage to Cargo—Exemption from Liability—Actual Fault or Privity—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 502.

By s. 502 of the Merchant Shipping Act, 1894: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—

"(i.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship . . . ."

A steamship was chartered to proceed to various ports in the River Plate and there load a cargo of grain for carriage to Hamburg. The shipowners had provided bunker coal more than enough to take the ship to the loading ports. Some of this coal was stowed in a reserve bunker on the port side separated from one of the ship's holds only by an unprotected steel bulkhead. The coal was unfit for the voyage. In this respect the vessel was unseaworthy. Shortly after she started on the return voyage a serious fire broke out in the port reserve bunker. The captain put into a port of refuge and incurred expense for the benefit of ship and cargo.

In an action by the shipowners against cargo owners for contribution towards a general average expenditure the defendants counterclaimed for damages for injury to their cargo owing to the fire. The fire having happened without the actual fault or privity of the plaintiffs:—

Held, (1.) that by virtue of s. 502 of the Merchant Shipping Act, 1894, which relieved the plaintiffs from liability for loss of or damage to the cargo, they were entitled to general average contribution.

The Carron Park (1890) 15 P. D. 203 and *Milburn & Co.* v. *Jamaica Fruit Importing, &c., Co.* [1900] 2 Q. B. 540 applied.

Dictum of Lord Halsbury in *Greenshields, Cowie & Co.* v. *Stephens & Sons* [1908] A. C. 431, 436 explained.

(2.) that, notwithstanding the unseaworthiness of the ship, the plaintiffs were not liable for loss of or injury to the cargo.

Virginia Carolina Chemical Co. v. *Norfolk and North American Steam Shipping Co.* [1912] 1 K. B. 229, and *Ingram & Royle, Ld.* v. *Services Maritimes du Tréport, Ld.* [1914] 1 K. B. 541 followed.

Decision of the Court of Appeal [1931] 1 K. B. 195 affirmed.

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* *Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD MACMILLAN.

APPEAL by the defendants in the action against an order of the Court of Appeal (1) reversing by a majority (Greer and Slesser L.JJ.; Scrutton L.J. dissenting) the judgment of Wright J. (2) on the claim, and dismissing the cross-appeal of the appellants on their counterclaim.

The substantial questions raised by the appeal were whether upon the construction of s. 502 of the Merchant Shipping Act, 1894, the owners of a British ship were entitled to recover against cargo owners a contribution towards general average expenditure incurred through a fire due to the unseaworthiness of the ship, and whether s. 502 debarred cargo owners from recovering for loss or damage to cargo by fire due to the unseaworthiness of the ship.

The facts are stated in the reports of the case before Wright J. and in the Court of Appeal, and sufficiently appear from the opinions of Viscount Dunedin and Lord Atkin.

1931. April 30; May 1, 4. *Sir Thomas Inskip K.C.* and *Sir Robert Aske* (with them *F. Martin Vaughan*) for the appellants. 1. As to the claim for contribution: The law of general average does not depend upon contract, but upon an equitable principle adopted from the Rhodian laws to the effect that extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo in time of peril should be borne proportionately by all concerned. But where a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim it would be manifestly unjust to permit him to recover from those whose goods are saved, for he cannot be allowed to take advantage of his own wrong. Accordingly, where the average loss is occasioned by the unseaworthiness of the ship, it has been held that that is a good answer to a claim by the shipowner against the cargo owners for contribution. The law of general average may be modified or excluded by express contract, but there is here no exception of unseaworthiness. The shipowner is under a common law obligation to provide a seaworthy ship and it is his default in that respect which has

(1) [1931] 1 K. B. 195. (2) [1930] 1 K. B. 699.

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caused the loss: *Simonds* v. *White* (1); *Schloss* v. *Heriot* (2); *Strang, Steel & Co.* v. *A. Scott & Co.* (3)

Sect. 502 of the Merchant Shipping Act, 1894, exempts the shipowner from liability to make good any damage caused by fire to the cargo without his actual fault or privity. Assuming that the section applies where the fire is due to the unseaworthiness of the ship, it relieves the shipowner from the consequences of his default in not providing a seaworthy ship, but it does not put him into the position of having fulfilled every obligation under his contract so as to entitle him to claim a general average contribution from the cargo owners. Sect. 502 is one of a group of sections headed, "Liability of Shipowners." It is not a section conferring rights on the shipowner, but relieving him from liability. The statutory protection is a shield and not a sword. It does not affect a claim of general average, either by or against the shipowner: *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (4) [See also *The Ettrick* (5); *Schmidt* v. *Royal Mail Steamship Co.* (6); *Burton* v. *English & Co.* (7); *Kish* v. *Charles Taylor, Sons & Co.*, per Lord Atkinson. (8)] The respondents' case is founded on *The Carron Park*. (9) In that case a claim was made for contribution from the cargo in respect of a general average expenditure incurred as the result of the negligence of one of the engineers of the shipowner, but the charterparty contained an exception of any neglect or default of the servants of the shipowner. Sir James Hannen upheld the claim on the ground that negligence for which by the terms of the contract of affreightment the shipowner was not responsible was as foreign to him as to the person who had suffered from it, and that decision was followed by a majority of the Court of Appeal (A. L. Smith and Romer L.JJ.; Vaughan Williams L.J. dissenting) in *Milburn & Co.* v. *Jamaica Fruit Importing*

(1) (1824) 2 B. & C. 805, 811.

(2) (1863) 14 C. B. (N. S.) 59.

(3) (1889) 14 App. Cas. 601, 609.

(4) [1908] 1 K. B. 51, 56; [1908] A. C. 431, 436.

(5) (1881) 6 P. D. 127, 129, 132, 135, 136, 137.

(6) (1876) 45 L. J. (Q. B.) 646, 648.

(7) (1883) 12 Q. B. D. 218, 220, 222.

(8) [1912] A. C. 604, 620.

(9) 15 P. D. 203, 207.

Co. (1) The late Judge Carver, in his Carriage by Sea, 4th ed., s. 373 (*c*), criticizes those decisions on the ground that a mere general exception of negligence in the contract of carriage ought not to be treated as modifying the implications of the law of general average, which depends not on contract but on the law maritime. Even if the insertion of an excepted peril in the contract of affreightment enables a shipowner to recover from cargo owners a general average contribution occasioned by such peril, those cases are distinguishable because here the fire was caused by unseaworthiness, and the shipowner has no protection under the contract of affreightment against unseaworthiness; but unless distinguishable those cases were wrongly decided. The contrary was decided in the United States in *The Irrawaddy.* (2)

2. As to the counterclaim, in which the appellants claim damages for the value of the cargo destroyed by the fire: That has been disallowed by the Courts below on the authority of *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (3) and *Ingram & Royle, Ld.* v. *Services Maritimes du Tréport, Ld.* (4) The appellants submit that those cases were wrongly decided. It is impossible to suppose that the Legislature intended the protection afforded by s. 502 to be given to a shipowner who does not fulfil his fundamental duty of providing a seaworthy ship. Suppose this protection were given by an exception in the bill of lading the exception would not protect the shipowner until he had provided a seaworthy ship. That is an absolute duty from which there is no escape in the absence of express words of exception. The statutory protection should be read in the same way.

Raeburn K.C. and *R. I. Simey* for the respondents (relieved from arguing the question whether the section applied to an unseaworthy ship). As to the counterclaim: *Ingram & Royle, Ld.* v. *Services Maritimes du Tréport, Ld.* (4) concludes this point in favour of the respondents. As to the claim: "The

(1) [1900] 2 Q. B. 540.
(2) (1897) 171 U. S. 187.
(3) [1912] 1 K. B. 229.
(4) [1914] 1 K. B. 541.

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Rhodian law, which in that respect is the law of England, bases the right to contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence; and such exceptions as that recognized in *Schloss* v. *Heriot* (1) are in truth limitations on the rule which have been introduced, from equitable considerations, in the case of actual wrongdoers": *Strang, Steel & Co.* v. *A. Scott & Co.* (2) Although a claim for a general average contribution may be defeated where the emergency giving rise to the sacrifice has been due to the fault of the party claiming contribution, *The Carron Park* (3) and *Milburn & Co.* v. *Jamaica Fruit Importing Co.* (4) show that this limitation on the general rule does not apply where the fault has been excepted by the contract of carriage, the principle being that if the ship would not have been liable to the cargo owner if the cargo had been destroyed the cargo remained at the risk of the cargo owner, and there is no ground for precluding the shipowners from recovering a general average contribution from the cargo in respect of any sacrifice made in order to avert such destruction. In effect "fault" has been interpreted as meaning actionable fault. Notwithstanding the criticisms of the late Judge Carver on these decisions it is submitted that they were right, and in any case they have been the foundation of modern shipping practice and ought not to be lightly disturbed. Those cases are not affected by the decision of the majority of the Court in *The Irrawaddy* (5), which turned on distinctions between the law of the United States and the law of this country. As the above principle clearly applies where the "fault" is excused by the terms of the contract of affreightment the same result must follow where the fault is excused by a statutory provision which is impliedly incorporated into the contract of affreightment, unless excluded by express provision or necessary implication. There being here no such express or implied exclusion, Greer and Slesser L.JJ. were right in holding that this principle applied. The adverse view adopted by Wright J. and Scrutton L.J. is founded upon a misunderstanding of the decision of the House of Lords in *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (1) There shipowners, who were sued by cargo owners for the ship's proportion of general average, attempted to set up as an answer the provisions of s. 502, but it was held that, as a liability to contribute in general average was not loss or damage to goods. the section did not apply. It was in that sense that Lord Halsbury used the phrase, "the statute was not dealing with average at all." The respondents are not contending that s. 502 gives them a right to claim a general average contribution, they could claim that right apart from the section altogether. General average expenditure is extraordinary expenditure made for the purpose of averting an existing peril for the general benefit. Supposing the master had decided to do nothing the shipowner would not have been liable to pay anything to the cargo owners because of the statutory exemption from liability.

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(1) 14 C. B. (N. S.) 59.
(2) 14 App. Cas. 601, 609.
(3) 15 P. D. 203.
(4) [1900] 2 Q. B. 540.
(5) 171 U. S. 187.

[They also referred to *The Satanita* (2); *Klein* v. *Lindsay*. (3)]

[*Sir Thomas Inskip K.C.* in reply referred to *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (4)]

The House took time for consideration.

1931. June 26. Viscount Dunedin (read by Lord Thankerton). My Lords, the respondents are the owners of the steamship *Campus*, and the appellants are the owners of a cargo of maize and grain shipped on board the *Campus* on a return voyage from the River Plate to the United Kingdom. Shortly after starting on the homeward voyage fire broke out in the ship's bunkers, which heated and destroyed a part of the maize and threatened to spread and destroy more cargo and endanger the ship. The captain accordingly put into the port of Monte Video, threw part of the maize overboard, and put more of it into lighters, some of which, from its condition, had to be destroyed. In doing so, general average expenses were incurred.

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(1) [1908] A. C. 431, affirming the C. A. [1908] 1 K. B. 51.

(2) [1897] A. C. 59.

(3) 1910 S. C. 231; [1911] A. C. 194.

(4) (1882) 7 App. Cas. 795, 810.

The present action was raised at the instance of the ship against the cargo owners for a contribution to the general expenses so incurred. The cargo owners denied liability and counterclaimed for the value of the maize destroyed. This they did upon the ground that the fire was due to bad bunker coal or, in other words, the unseaworthiness of the ship. The case was heard before Wright J., who held that the ship was unseaworthy. He held that the claim by the ship for general average contribution was not good and that the counterclaim for damage to the cargo was bad in respect of the provisions of s. 502 of the Merchant Shipping Act of 1894. That section, so far as the material part is concerned, is as follows: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—(1.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship." Wright J. held that the loss happened without the actual fault or privity of the owners and that the destroyed maize was lost by reason of fire on the ship.

An appeal being taken to the Court of Appeal, that Court unanimously upheld Wright J.'s judgment as to the counterclaim, but differed as to the claim for general average. Scrutton L.J. agreed with Wright J., but Greer and Slesser L.JJ. held that the claim for general average succeeded.

Appeal is now taken to this House by the cargo owners.

There are thus two questions distinct in themselves, and it is expedient to consider them separately.

First, as to the claim of the cargo owners for the destruction by fire, the fire being caused by a condition of things which amounted to unseaworthiness. Now, as to authoritative decision on this point, so far as the Courts below were concerned there can be no doubt. Where there was an exception in the bill of lading of fire on board, it had been held that that did not protect the ship when the fire was due to unseaworthiness. But whether the statutory exception against fire was elided by proving that the fire was due to unseaworthiness came up for decision in the *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1) Bray J. held that it was not, and his judgment was affirmed unanimously by the Court of Appeal and was followed in *Ingram & Royle, Ld.* v. *Services Maritimes du Tréport, Ld.* (2) Now these cases, though binding on the Court of Appeal, are not binding on your Lordships, and if you thought that they clearly were wrong, it would be your duty to hold that they were wrongly decided. But these cases were not only the unanimous decision of learned judges, but they have ruled the conduct of shipping for seventeen years, and it would obviously be against your Lordships' custom to disturb such a practice unless, as I say, you thought they were clearly wrong. My Lords, I cannot say any such thing. As far as my own opinion is concerned, I think they were rightly decided. No doubt the point was very arguable. The arguments pro and con are most clearly and candidly put by Kennedy L.J. in the *Virginia* case. (1) But what turned the scale was that, to come to the result opposite to that of the decision would be, as Vaughan Williams L.J. put it, "to change the words of the section from 'a British sea-going ship' into 'a British sea-going seaworthy ship.'" The judges in the *Virginia* case (1), while thus pronouncing on the interpretation of s. 502, held that in that case s. 502 was impliedly excluded by the terms of the bill of lading, and the appellant has put forward the same argument in this case. The same argument was urged in the case of *Ingram & Royle* (2), but was unsuccessful, it being pointed out that the reason of the exclusion in the *Virginia* case (1) was based on the fact, not that the bill of lading mentioned fire as one of the exceptions, but that it went on in the concluding part to deal exhaustively with the question of seaworthiness, while in *Ingram & Royle's* case (2) there was no such concluding part. The same answer must be

(1) [1912] 1 K. B. 229.

(2) [1914] 1 K. B. 541.

made in this case. In other words, the bill of lading equiparates with the bill of lading in *Ingram & Royle's* case (1) and not with the bill of lading in the *Virginia* case. (2)

I am, therefore, for these reasons, of opinion that the decision of the Courts below on the first point, that is to say, the counterclaim for damage to the maize, was right.

The second question, whether the ship could demand a general average contribution under the circumstances of the case, is not dealt with by direct authority. But there is a body of decided authority on several propositions, and the question is how that general authority is to be applied to this case. That the expenditure here was of the class which gives rise to a claim for general average contribution is not denied. It was incurred in order to save the ship and cargo from the further peril from fire. "But then," say the appellants to the respondents, "the fire was caused by unseaworthiness due to your fault, and therefore, on the authority of *Schloss* v. *Heriot* (3), an authority upheld by *Strang, Steel & Co.* v. *A. Scott & Co.* (4), you cannot recover because it was your own fault which necessitated the average expenditure." To which the respondents retort: "It was settled by *The Carron Park* (5), and again by *Milburn & Co.* v. *Jamaica Fruit Importing, &c., Co.* (6), that where there was an exception in the bill of lading against fault as causing fire, the rule has no application and the statutory exception against fire in s. 502 must have the same effect." These counter propositions, so far as based on the cases quoted, are all correct, so that the crucial question is whether the statutory exception of liability introduced by s. 502 has the same effect as had the exception in the bill of lading in *The Carron Park* and *Milburn*. It is also possible to contend, and the appellants' counsel did so contend, that the two cases of *The Carron Park* and *Milburn*, which are not binding on your Lordships, though they were on the Courts below, were wrongly decided.

(1) [1914] 1 K. B. 541.
(2) [1912] 1 K. B. 229.
(3) 14 C. B. (N. S.) 59.
(4) 14 App. Cas. 601.
(5) 15 P. D. 203.
(6) [1900] 2 Q. B. 540.

It is, I think, best first to consider the ground on which the answer to a demand for contribution is made when the circumstances which give rise to the necessity for general average expenditure are due to the fault of the person claiming the contribution. The most authoritative statement is to be found in the opinion of Lord Watson in *Strang, Steel & Co.* (1) In that case, what caused the necessity of sacrificing something for the general safety of all was negligent navigation by the master. The loss incurred was by the jettison of cargo. The litigation arose in a somewhat peculiar way. The ship having arrived, the agents for the ship gave notice to all the consignees of cargo that they would not be allowed to remove their goods unless they made a deposit of 5 per cent. on the value "against probable average claims." In order to get their goods, certain consignees paid the deposit under protest and then raised action to get back the money so paid. They also said they had made a sufficient tender, but that aspect of the case may be disregarded. In their pleadings the plaintiffs added a plea that they were not liable to contribute to general average on account of the ship or cargo (i.e., sacrificed cargo) because the jettison was rendered necessary by the negligence of the master. The Recorder at Rangoon, before whom the case was defended, gave effect to this plea and ordered the return of the money. This could only be right if under the circumstances there could not arise any general average claim. Lord Watson, in delivering judgment, which reversed the decision of the Recorder, opened his remarks thus: "In the course of the argument upon this appeal, three separate points were raised and fully discussed. The appellants argued, (1.) that innocent owners of cargo sacrificed for the common good are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the ship-master's fault; (2.) that in respect that the bills of lading for the cargo of the *Abington* specially excepted 'any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship,' the owners of cargo saved are not, so far as concerns any question of contribution, in a position to plead the fault of the master" ; and then the question of tender, which may be disregarded.

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(1) 14 App. Cas. 601, 605, 608, 609.

Lord Watson then went on to discuss the origin of the doctrine of general average based on the Rhodian law, and his opinion may be summed up in the words of the headnote : "The rules of maritime law relating to the rights and remedies resulting from a proper case of jettison are :—

1. Each owner of jettisoned goods becomes a creditor of ship and cargo saved.

2. He has a direct claim against each of the owners of ship and cargo for a pro rata contribution towards his indemnity ; which he can recover (*a*) by direct action ; (*b*) by enforcing from the shipmaster, who is his agent for that purpose, a lien on each parcel of goods salved to answer its proportionate liability."

But Lord Watson went on to discuss the exceptions to the law of general contribution and he expressed himself thus : "When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, and, as such, under an obligation to use every means in his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save." And then, after approving of *Schloss* v. *Heriot* (1), he sums up thus : "The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the *Abington*, unless the conditions ordinarily existing between parties standing in that relation have

(1) 14 C. B. (N. S.) 59.

been varied by special contract between them and their shippers."

Now, it will be observed that contention (2.) as above was exactly the contention in *The Carron Park.* (1) That contention (2.) Lord Watson refused to decide because it was not proved that the bills of lading did all contain the exception, but I think it is clear that he inserted the rider: "Unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them" —because he foresaw that the same case as subsequently arose in *The Carron Park* (1) might emerge. He refused, as I have already said, to decide it, but he pointedly said that the case would be open when the question of the average adjustment came to the front.

Now, that brings me to the case of *The Carron Park* (1) itself, as approved of in *Milburn.* (2) I should say that I think that Lord Watson's opinion in *Strang, Steel & Co.* (3) gives one an indication that he would have approved of the judgment in *The Carron Park* (1), and that for two reasons. In the first place, he was examining the whole law, and if he had thought that the second point was irrelevant as stated, I think he would have said so, instead of saying that he would not decide it because he was not sure of the facts. In the second place, in his general discussion he had clearly put the exception as being based on the tortious act of the shipowner and his agent, the captain, and it was that conception of tortious act which postulates an actionable wrong that was the prevailing argument in *The Carron Park* and *Milburn.* And here again we are faced with the question of interfering with judgments which have held the field for a long time, and on which shipping practice has been based, for *The Carron Park* was decided in 1890 and *Milburn* in 1900, and now we are in 1931. I am therefore of opinion that it would be wrong for your Lordships to hold that *The Carron Park* and *Milburn* were wrongly decided.

And now arises the last and most difficult question. *The Carron Park* and *Milburn* were both cases where the cause of

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(1) 15 P. D. 203.
(2) [1900] 2 Q. B. 540.
(3) 14 App. Cas. 601.

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the danger which led to the position of general average was the negligence of the captain. Though unseaworthiness was pleaded in *The Carron Park*, the President found against that plea and put the negligence as a negligence during the voyage. *Milburn* was a case of collision by negligence, and there is no doubt that, had the trouble arisen from unseaworthiness, the decisions would have been, apart from a possible argument on the statute of 1894, the other way, for a mere exception against fault in the bill of lading does not cover unseaworthiness: *Steel* v. *State Line Steamship Co.* (1)

Does then s. 502, decided as it has been to include unseaworthiness, put the position into the same as that of *The Carron Park*? My Lords, this is what has caused the difference of judicial opinion in the Courts below, and I do not hesitate to say that the first inclination of my mind was to agree with Scrutton L.J. and Wright J., but in the end I have come to the opposite conclusion. The argument for their opinion is, I will not say based, but greatly fortified by the dictum of Lord Halsbury in *Greenshields'* case (2), where, dealing with the very section, he said: "The statute is not dealing with average at all." Moreover, at first sight it is startling that a section which was framed as one to limit liability, i.e., so to speak, is of a negative complexion, may be used to give a right which does not otherwise exist, i.e., so to speak, is of a positive complexion. The argument which prevailed in the end with me was this: the answer to the exception of the right to claim general average which was held good in *The Carron Park* (3) and *Milburn* (4), which I have already held were rightly decided, turned entirely on the question of whether the shipowner, as in a question with the shipper, had committed an actionable wrong.

Now, s. 502 says that, if fire is the cause of the trouble, there is no actionable wrong committed by the shipowner, however much he may have caused the fire; and by decision (which here again I have already approved) this is explained to embrace fire when caused by unseaworthiness. Therefore in this case there is no actionable wrong in what the shipowner did, and consequently the answer to the exception is not a good one, just as was found in *The Carron Park* and *Milburn*. Put in other words, the argument may read thus: "The effect of s. 502 is to incorporate that section in every bill of lading," or, if it is better expressed, "to impose an added contract besides that expressed in the bill of lading." Once so incorporated or added, there is obviously no actual wrong committed by the owner of the ship, and the principle of *The Carron Park* and *Milburn* applies. I ought, perhaps, to add that, as the expression in s. 502 is "shall not make good any loss," the appellants argued that there was still an actionable wrong, and that all the statute did was to say you shall not pay for it. I think that argument is the argument of a drowning man. An actionable wrong for which you can recover nothing is a contradiction in terms.

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(1) (1877) 3 App. Cas. 72.
(2) [1908] A. C. 431, 436.
(3) 15 P. D. 203.
(4) [1900] 2 Q. B. 540.

Now, as to the dictum of Lord Halsbury. (1) It was a case where coal caught fire by spontaneous combustion, and it was argued that the owner of the rest of the coal which had been damaged by water poured on it could not claim a general average contribution because the whole trouble had come from what was termed the inherent vice of the coal. But Lord Halsbury disposed of that by pointing out that "inherent vice" was really a faulty expression. Had the fire been traced to an actual fault on the part of the owner of the coal it would have been otherwise, on the principle of *Schloss* v. *Heriot* (2), but there was no fault on the part of the owner of the coal. He knew nothing wrong about it and the shipowner approved, without demur, to the shipping of that particular coal. Then an additional argument upon s. 502 was brought in. It was said that, as s. 502 says the shipowner is not to be liable to pay for any loss by fire, he cannot be called on to contribute to general average for the benefit of the coal owner, to which the obvious answer was that a general average contribution does not rest on any idea of loss on the part of the person called to make it, or, in other words, a section which absolves you from loss does not absolve you from something which is not loss at all, and Lord Halsbury added the observation in question. It was quite true, as he said, that the section was not dealing with general average, but none the less, the result of the section may have an effect on general average. I therefore think that the argument I have set forth is not displaced by Lord Halsbury's remark.

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(1) [1908] A. C. 431, 436.

(2) 14 C. B. (N. S.) 59.

I move that the appeal be dismissed with costs.

Lord Warrington of Clyffe. My Lords, the respondents in the present appeal are the owners of the steamship *Campus* and were plaintiffs in the action in which the appeal arises. The appellants are the owners of cargo shipped on the *Campus* and were defendants in the action.

The claim of the respondents was for a contribution to certain expenses now admitted to be general average expenses to which the appellants as cargo owners would prima facie be bound to contribute. They defended the action on the ground that the emergency giving rise to the expenditure was caused by the unseaworthiness of the ship and that the shipowners were therefore in default, and, under the well established principles of the law of general average were debarred from claiming contribution from the owners of the cargo. These principles are stated in the judgment of the Judicial Committee prepared by Lord Watson in *Strang, Steel & Co.* v. *Scott* (1), and as so stated are not in dispute. To this defence it was replied by the respondents that under the provisions of s. 502 of the Merchant Shipping Act, 1894, they were under no liability to the appellants for loss or damage to their goods and were therefore not in default, in spite of the fact that they had committed a breach of the contract of carriage in respect of the unseaworthiness of the ship. The question therefore in the action is whether the reply of the respondents is well founded. It was rejected by Wright J., who dismissed the action. In the Court of Appeal it was accepted by the majority, Greer and Slesser L.JJ.; Scrutton L.J. dissenting.

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(1) 14 App. Cas. 601, 607.

The material facts on this point are no longer in dispute, and I will only summarize the result.

The trouble was fire on board arising from the character and condition of the coal carried in the bunkers, and the damage to cargo was occasioned by the near proximity of one of the holds in which maize was stored to a bunker the coal in which took fire, and the insufficient protection of the hold against fire in the bunker. These circumstances were found by Wright J. to constitute unseaworthiness causing the loss of and damage to cargo, and this finding is accepted.

The material part of s. 502 is as follows :—

"*Liability of Shipowners.*

502. The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases ; namely,—

(i.) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

In the present case the loss of or damage to the appellants' cargo happened by reason of fire on board the ship and without any actual fault or privity on the part of the respondents the shipowners. The shipowners were therefore completely freed from any liability to make good such loss or damage. It is not alleged that the breach of the ordinary implied warranty of seaworthiness gave rise to any other pecuniary claim.

The first question to be decided is what under the circumstances is the true effect of the contract of carriage in the present case. In my opinion, inasmuch as there is nothing in the contract expressed in the bill of lading by reference to the charterparty to exclude the operation of s. 502, the provisions of that section become an addition to the terms expressed in that contract. I am further of opinion, on the authority of *Ingram & Royle* v. *Services Maritimes du Tréport* (1), that the terms of the section are operative

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(1) [1914] 1 K. B. 541.

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notwithstanding that the cause of the trouble was the unseaworthiness of the ship. It follows that in the present case no part of the loss of or damage to the cargo can be recovered from the shipowners, but the whole of it falls upon the cargo owners themselves. On the other hand, of course, any damage to the ship falls to be borne by the shipowner.

The next question is how does the contract between the shipowner and the cargo owner affect the right of the former to contribution by the latter to general average expenses. I agree with Greer L.J. that the right to contribution arises whenever the expenditure is incurred or the sacrifice made in the interest of both the parties and not of one of them alone. In the present case, inasmuch as the whole of the loss of or damage to the cargo falls on the cargo owner, the expenditure in question is incurred in the interest of both parties, and a due proportion thereof in the shape of contribution in general average would be recoverable by the shipowner.

If the immunity of the shipowner were derived simply from a bill of lading absolving him from liability in the event which happened, the case would be completely covered by *The Carron Park* (1), and *Milburn* v. *Jamaica Fruit Co.* (2) Can it make any difference that the immunity is found in the added term supplied by s. 502 ? I can see no logical reason for so holding. The statutory provision is as much part of the contract as if the parties had written it out in the bill of lading itself. In my judgment, therefore, the decisions in the two cases above mentioned are applicable to the present case. I agree that they were rightly decided, but even if I were doubtful on this point I should not, for reasons expressed in the opinion of my noble and learned friend, Lord Dunedin, which I have had the advantage of reading, have been prepared now to overrule them.

I am of opinion, therefore, that the order of the Court of Appeal reversing the judgment of Wright J. in the original action should be affirmed.

As to the counterclaim, I agree that the order appealed from should be affirmed.

(1) 15 P. D. 203.

(2) [1900] 2 Q. B. 540.

It remains only to say a few words about the dictum of Lord Halsbury in *Greenshields* v. *Stephens* (1), that s. 502 is not dealing with questions of general average. On the facts of that case the provision of s. 502 was really irrelevant to the claim of the cargo owner to contribution by the ship, and the statement of Lord Halsbury was a dictum only. But though in a sense it is true that the section is not dealing with general average, yet when, as in the present case, its provisions become an added term of the contract of carriage, and, as the rights and liabilities of the several parties to contribution in general average depend upon the terms of the contract, the provisions of the section of necessity affect those rights and liabilities.

On the whole I agree that the appeal should be dismissed with costs.

Lord Atkin. My Lords, the question in the present case arises on the claim of the respondents, the owners of the steamship *Campus*, against the appellants, the owners of a grain cargo shipped on board the *Campus*, for contribution in respect of a general average expenditure occasioned to avert a loss caused by fire on board. The appellants reply that the fire was caused by the respondents' fault in that it was due to unseaworthiness of the ship. The respondents rejoin that the appellants cannot rely on any such fault by reason of the provisions of s. 502 of the Merchant Shipping Act, 1894. This raises an interesting issue in the law of general average, at one time the subject of controversy, but, as I venture to suggest to your Lordships, now settled by authority of the Court of Appeal and accepted by the shipping world for about a generation. It will only be necessary to deal shortly with the facts as many of the issues that arose in the course of the proceedings have disappeared in the progress of the case to this House. The ship proceeded outwards from Cardiff with a cargo of coal and sufficient bunkers to take her outwards to the Argentine and part of the way home. On her way out she was chartered by an Argentine company on the terms of the Centrocon charterparty to load a cargo of grain at Argentine ports and proceed to a Continental or United Kingdom port. The exception clause of the charter provides: "The steamer shall not be liable for loss or damage occasioned by . . . . fire from any cause or wheresoever occurring . . . . even when occasioned by the negligence default or error of judgment of the master, mariners or other servants of the shipowners or persons for whom they may be responsible." The charter also provides "Average if any payable according to York-Antwerp Rules, 1924." The ship duly loaded a cargo of maize under bills of lading of which the appellants are the holders, which merely incorporate the terms of the charter as to exceptions and expressly repeat the terms adopting the York-Antwerp rules of 1924. Having received a full cargo she started on her homeward voyage, but before she left the Plate fire broke out in the bunkers which reached part of the cargo. The ship in consequence put in to Monte Video, discharged part of the damaged cargo, and incurred expenditure which it is common ground was general average expenditure. The question in dispute is whether the ship can recover a contribution for it from the cargo. It has been found that the fire was due to unseaworthiness without the fault of privity of the owners. The ship therefore cannot rely on the exceptions which are not so drawn as to include unseaworthiness. In these circumstances the cargo owners apparently thought themselves in a position to counterclaim for damage to their cargo caused by fire, including the general average contribution if any to which they were liable.

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(1) [1908] A. C. 431, 436.

This claim was defeated by the provisions of s. 502 of the Merchant Shipping Act. It was contended by the cargo owners that the protection given by the section was not extended to cases of fire occuring in an unseaworthy ship. I am satisfied that this contention fails. It has been decided to the contrary in the Court of Appeal; and I see no reason why a condition so important, and if intended so easily expressed, should be read into a clause which was obviously intended to give relief against possibly overwhelming claims to shipowners who were themselves not in actual fault.

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The case therefore before us has been confined to the shipowner's claim for contribution. The answer of the defendants is based on the finding that the fire was due to unseaworthiness. The cargo owner says that the shipowner cannot claim contribution where the peril threatening the whole adventure is due to his fault. The reply of the shipowner is that such a defence can only be made where the alleged fault is an actionable wrong, and that it has been held that where the contract of carriage relieves the shipowner from responsibility for what otherwise would be an actionable wrong the rule no longer applies, and that in the present case the statute has the same effect as an express exception relieving the shipowner of liability for unseaworthiness causing fire. The cargo owner in this House has made a double rejoinder. In the first place he attacks the decisions which allow the shipowner in general average to rely upon contractual exceptions to relieve himself of the consequences of fault: in the second place he says that, assuming such decisions to stand, the statutory provisions have not the same effect and cannot be used as having any influence at all on any question of general average.

It is now well established in our municipal law that a shipowner cannot claim a contribution for a general average sacrifice or expenditure where the peril that occasioned the sacrifice or expenditure was due to the fault of himself or his servants. But this proposition is of little practical value until a correct connotation is given to the word "fault." The first appearance of the doctrine in a reported case, so far as I am aware, is to be found in *Schloss* v. *Heriot*. (1) That was an action by a shipowner against cargo owner for contribution in respect of a general average loss. The defendant, for a fourth plea, averred that the ship was unseaworthy at the commencement of the voyage, and that the average loss "was caused and occasioned and arose and happened from and in consequence of such unseaworthiness." The case was decided on demurrer, counsel for the defendant arguing that the plea was good, inasmuch as it showed that the loss was occasioned by the actionable negligence and misconduct of the plaintiff himself. Erle C.J., in giving judgment, said: "The fourth plea I think is a good one. It shows that the plaintiff was himself the cause of the loss,—that his actionable negligence and misconduct produced the very damage for which he seeks to recover contribution from the defendants. Further, I am of opinion, that, if necessary, the plea is sustainable on the ground that the defendants would be entitled in a cross-action to recover back the whole sum claimed by the plaintiff in this action." Willes and Keating JJ. concurred. It is plain that the decision in that case proceeded on the footing that the fault relied on was actionable: the first head of the judgment is that the plaintiff himself caused the loss by his actionable negligence and misconduct: the second head is circuity of action, which necessarily involved actionable fault. In *The Ettrick* (1) the owner of a ship which had been sunk by a collision for which the ship was to blame had raised the ship, and, having limited his liability in accordance with the statute, claimed a contribution from the cargo owner for either salvage or general average. The Court of Appeal refused contribution, Brett L.J. saying if the general average contribution arose by reason of a default of his he cannot claim anything. Cotton L.J. said that it would be against equity to say that a person who himself has done the wrongful act which caused the expenditure shall claim from any one else. I think it plain that Brett L.J. in speaking of "default" and Cotton L.J. in speaking of "wrongful act" had in mind the class of act which was the subject of their discussion—namely, an actionable wrong, in that case negligence causing collision. Similarly in *Strang, Steel & Co.* v. *Scott & Co.* (2) Lord Watson, in stating the principle that where a person has by his own fault occasioned the peril it would be unjust to permit him to recover from the cargo owners, proceeds to say that in any question with them he is a "wrongdoer" and must seek to mitigate the consequences of his "wrongful act." He then refers to the property imperilled "by his own tortious act" and cites *Schloss* v. *Heriot* (3) as the leading English authority.

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(1) 14 C. B. (N. S.) 59.

(1) 6 P. D. 127. (2) 14 App. Cas. 601, 608. (3) 14 C. B. (N. S.) 59.

The English law on this matter is to be found in these authorities; and I can find no trace of any principle other than that the fault which deprives the claimant of his right to contribution must be fault which is an actionable fault against the person from whom contribution is claimed. A statutory limitation of liability of course does not defeat the principle: it leaves the fault actionable, as was decided in *The Ettrick.* (1) I myself find it difficult to conceive of a fault in this relation which, though not actionable, is yet in some manner so blameworthy as to deprive the party of his right to contribution. It is further to be noted that the principle does not prevent an act which otherwise complies with the conditions from being a general average act. For such a purpose one does not look at the cause of the peril, but the quality of the acts done to avert it. In other words, a cargo owner who has suffered a general average sacrifice may claim contribution from his fellow cargo owners though the peril be incurred by the negligence of the ship. If any authority be required for this it is to be found in *Strang, Steel & Co.* v. *Scott & Co.* (2) The question therefore always is one of the immediate relations between the claimant for contribution and the contributory interests.

I have dwelt upon the necessity for the fault to be actionable to illustrate the cases relied on by the shipowner which seem to me to decide that, where the act causing the peril is by convention of the parties not actionable, the claimant who has committed the act is not precluded from obtaining contribution.

The first of these is *The Carron Park* (3), decided by Sir James Hannen in 1890. There a cargo of sugar was loaded on the defendant's ship on the terms of a charterparty which contained an exception clause, "neglect or default whatsoever of the pilot master crew or other servants of the shipowner always excepted." The cargo was damaged by water through a valve being negligently left open by one of the engineers of the vessel. The action was for damage to cargo:

(1) 6 P. D. 127.
(2) 14 App. Cas. 601, 608.
(3) 15 P. D. 203, 207.

the shipowner pleaded the exception and counterclaimed for a general average contribution. The President gave effect to the exception on the claim, and held the shipowner entitled to contribution in general average. He says: "The claim for contribution as general average cannot be maintained when it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it." After citing from Lord Watson in *Strang, Steel & Co.* v. *Scott & Co.*, he proceeds: "Here it appears to me that the relation of the goods owner to the shipowner has been altered by the contract—that the shipowner shall not be responsible for the negligence of his servants in the events which have happened." This decision, which was criticized at the time by a writer of great authority on such matters, the late Judge Carver, in his work, Carriage of Goods by Sea, 4th ed., s. 373 (*b*) (*c*), was affirmed and followed by the Court of Appeal in *Milburn* v. *Jamaica Fruit, &c., Co.* (1) In that case the shipowners had chartered the *Port Victor* to the defendants by a charterparty which contained an exception clause, "negligence of the master . . . . or other servants of the shipowner or charterers always mutually excepted." The captain was to be at liberty to sign bills of lading at any rate of freight the charterers might choose without prejudice to the stipulations of the charterparty, and the charterers agreed to indemnify the owners from any consequence that might arise from the captain signing bills of lading. During the currency of the charter the captain by the charterers' instructions signed bills of lading for cargo without a negligence clause. The ship collided with another ship through the negligence of the captain. The ship in consequence incurred certain general average expenditure. The shipowners sued the charterers for an indemnity, alleging that by reason of the absence of the negligence clause they had lost their right to a contribution against the bill of lading holders. The defence argued by Mr. Carver K.C. and Mr. Scrutton was that if the bills of lading had contained a negligence clause still the shipowner would not have been entitled to contribution, and that the decision in *The Carron Park* (1) was wrong. The Court by a majority (A. L. Smith L.J. and Romer L.J.; Vaughan Williams L.J. dissenting), gave judgment for the shipowner and affirmed *The Carron Park.* (1) A. L. Smith L.J., a judge of large experience in these matters, said (2): "To create the shipowner a wrongdoer as regards the cargo owner there must be the breach of some duty, and if by agreement between the two it has been agreed that it shall be no breach of duty for the master to be guilty of negligence, in other words, that as between the two the negligence of the master shall be always excepted, it cannot be said that it is a breach of duty towards the cargo owner for the master to be guilty of that which the cargo owner and shipowner have agreed shall be no breach of duty at all." Romer L.J. expressed the same reasoning, pointing out that, with the negligence clause, at the moment of the sacrifice shipowner and cargo owner between themselves stood on a footing of equality.

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(1) [1900] 2 Q. B. 540.

My Lords, since that date the decision has stood undisturbed by any authority. It has been followed in Scotland. Countless contracts of carriage by sea must have been made on the footing that it was correct, and general average claims adjusted accordingly. Even if one were to assume that had the case at the time come on appeal for decision before your Lordships, the balance of argument would be on the side of the cargo owners, I apprehend that at the present date your Lordships would have felt the greatest difficulty in overruling a decision not unreasonable in itself upon which so many people have acted and regulated their mutual obligations in an important branch of commerce. It is noteworthy that the statutory exceptions in the Carriage of Goods by Sea Act, 1924, must have been agreed to on the footing that the law was as laid down in these cases. I should therefore myself have been content to accept the decision on this ground alone. But I think the reasoning correct. If by convention between the parties the so-called fault is an act which is not actionable as between them, the foundation for the doctrine invoked disappears. It is no longer a wrong of the shipowner which has caused the peril: it is no longer inequitable for him to enforce a contribution. Counsel for the cargo owner fell back upon another argument. Assume, they said, that the ship recovers if the exception is so drawn as expressly to displace the duty as by saying negligence excepted, yet, if the exception does not expressly displace the duty, but merely says that the ship is not responsible for the consequences of the negligence, then the original principle survives. My Lords, this seems to me much too narrow a view to find a place in the construction of a commercial contract. The object of the exception is to protect the person committing the act in question from liability for any consequences of it; and this is effectively secured whether it is said that there shall be no duty to avoid doing the act or no obligation to pay any compensation if it is done. Both forms of words, according to English law, prevent any liability from arising either in contract or tort.

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(1) 15 P. D. 203.

(2) [1900] 2 Q. B. 540, 546.

I think that up to this point there has been no difference of opinion in the Courts below. I see no disposition on the part of Wright J. or Scrutton L.J. to question the correctness of the decisions in *The Carron Park* (1) and in *Milburn* v. *Jamaica Fruit, &c., Co.* (2) The only difference has been upon the effect of s. 502. As a matter of principle I am unable to see any distinction in this context between a contractual exception and a statutory exception. If the words of the statute had been written into the charterparty there could be no doubt that the right to contribution would not be defeated, always assuming that *The Carron Park* (1) was, as I have held, rightly decided. That the act or omission is made by statute not actionable rather than by agreement can hardly be a circumstance affecting the ultimate liability. By the most effective method it is prescribed that in cases falling within the statute there is no actionable fault. If so the right to contribution is not destroyed. With unfeigned

(1) 15 P. D. 203.

(2) [1900] 2 Q. B. 540.

respect to the two very learned judges who took a different view, whose opinions on such a matter are of the greatest weight, they have I think imputed to a sentence of Lord Halsbury in *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (1), more than it was intended to convey. In that case, fire having broken out in a cargo of coal, the whole cargo was damaged by water in the course of saving both ship and cargo. The cargo owners claimed against the ship contribution in general average. The ship set up the provisions of s. 502. This House affirming Channell J. and the Court of Appeal held that the section afforded no answer. It applied to a liability sought to be imposed upon a shipowner for damage to goods by fire where otherwise he would be liable on his contract of carriage or by reason of his custody of the goods. Lord Halsbury said: " The statute is not dealing with average at all." This statement seems in its context to be reasonably plain. Similarly, if the shipowner had sought to protect himself from a contribution by relying on a bill of lading exception it would rightly be said the bill of lading is not dealing with average at all. For, I think, there can be no doubt that the bill of lading exceptions operate to relieve the shipowner from the consequences of non-delivery of goods or delivery of damaged goods in breach of duty arising from his having agreed or assumed to carry them: *Schmidt* v. *Royal Mail Steamship Co.* (2); *Crooks* v. *Allan* (3); *Burton* v. *English & Co.* (4) Indeed, if it were otherwise, the exception of " perils of the sea " alone, the oldest of exceptions, would have made the cargo owners' right of contribution against the ship of little practical value. The statute, then, is not dealing with average, but it is dealing with actionable fault, and, as the suggested defence to the claim for contribution is actionable fault of the claimant, the statute defeats such a defence. I have not thought it necessary to deal with the decision of the Supreme Court of the United States in *The Irrawaddy* (5), because, as pointed out by Greer L.J., in the Court of Appeal, that case was decided on distinctions then existing between the law of the United States and this country to which the majority of the Supreme Court expressly drew attention.

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(1) [1908] A. C. 431, 436.
(2) 45 L. J. (Q. B.) 646.
(3) (1879) 5 Q. B. D. 38.
(4) (1883) 12 Q. B. D. 218
(5) 171 U. S. 187.

In my opinion the view of the majority of the Court of Appeal in this case ought to prevail, and this appeal should be dismissed with costs.

LORD THANKERTON. My Lords, I have had the opportunity of considering the opinion of my noble and learned friend, Lord Dunedin, and I entirely concur in it.

LORD WARRINGTON OF CLYFFE. My Lords, I have been asked to say that my noble and learned friend, Lord Macmillan, concurs in the opinions which have been delivered.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 26, 1931.

Solicitors for the appellants: *Ince, Roscoe, Wilson & Glover.*

Solicitors for the respondents: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

[HOUSE OF LORDS.]

H. L. (E.)*
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July 6.

KITCHEN . . . . APPELLANT;

AND

C. KOCH AND COMPANY, LIMITED . RESPONDENTS.

Workmen's Compensation—Industrial Disease—Failure to claim Compensation within Six Months of the Accident—Reasonable Cause—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 14, *sub-s.* 1; *s.* 43.

A certificate of disablement granted to a workman under s. 43 of the Workmen's Compensation Act, 1925, the section dealing with industrial diseases, certified as the date of disablement a date more than six months before the date of the certificate. Consequently a claim by the workman for compensation founded upon the certificate was not made within the period prescribed by s. 14, sub-s. 1, of the Act—namely, six months from the occurrence of the accident, the disablement being treated by s. 43 as the happening of the accident. If the certificate had been granted immediately after the examination of the workman by the certifying surgeon the claim for compensation could have been made in time:—

Held, on the facts, that the failure to make the claim within the prescribed period was due to the delay of the certifying surgeon and, so far as the workman was concerned, was occasioned by reasonable cause, within proviso (*b*) to sub-s. 1 of s. 14, and that the workman was entitled to compensation.

Moore v. *Naval Colliery Co.* [1912] 1 K. B. 28 discussed.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal affirming an award of the judge of the County Court of Lancashire made in favour of the respondents, the employers, in an arbitration under the Workmen's Compensation Act, 1925.

The following statement is taken from the opinion of Lord Blanesburgh:—

"For seventeen years up to June, 1928, the appellant had been in the service of the respondents as an operative cotton spinner. He ceased to be employed on June 13, 1928, on which day the respondents' works were closed. He was never again employed by any one. On July 24, 1929, he applied for and obtained what he thought was

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* *Present*: VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD ATKIN, and LORD THANKERTON.

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a certificate of disablement from the certifying surgeon of the district. The certificate was blundered in two ways. It certified that the disease from which he was suffering was 'epithelioma of scrotum being one of the diseases to which the Workmen's Compensation Act applies.' Now epithelioma of the scrotum is not an industrial disease; any one may have it. The industrial disease from which as a fact the man was suffering was epitheliomatous cancer or ulceration of the skin due to tar, pitch, bitumen, mineral oil or paraffin, or some compound, product or residue of one or more of these substances. Secondly, the date of disablement was not specified, and the words which have to be struck out in order to make the date of disablement the date of the certificate were only partially struck out.

On getting this certificate from the trade union agent who was acting for the appellant, the employers, after discussion, repudiated liability in respect that they thought that the certificate was a good certificate and that no date of disablement being specified the date must be the date of the certificate, which was more than twelve months after the appellant had left their service: The final repudiation was intimated on September 1, 1929. The appellant's agent then woke up to the fact that the so-called certificate was no certificate at all, and after a delay for which no real explanation is given he applied again to the certifying surgeon on November 19, 1929, for a certificate. The certifying surgeon again examined the appellant and then sent another certificate. This time the certificate contained a proper description of the industrial disease, but it specified the date of the disablement as 'the 22nd day of 1929.' The agent sent it back to the surgeon, who eventually sent it back dated January 18, 1930, having scored out 1929 and inserted after the words 'the 22nd day of' the words 'May, 1929,' thus fixing the date of disablement. On this a claim was made on January 30, 1930."

The county court judge held that on the facts the failure of the appellant, the workman, to claim compensation within the time prescribed by the Act was not occasioned by any reasonable cause, and that the appellant was therefore not entitled to recover compensation, and the Court of Appeal (Lord Hanworth M.R., Slesser and Romer L.JJ.) agreed with him.

1931. June 9, 11. *Edward Cave K.C.* (with him *C. H. Spafford*) for the appellant. The question is whether the failure of the appellant to make a claim for compensation within six months from the occurrence of the accident was occasioned by mistake or other reasonable cause. By s. 43, sub-s. 1, of the Workmen's Compensation Act, 1925, in the case of an industrial disease no claim for compensation in respect thereof can be made until the certifying surgeon has made a certificate that the workman is suffering from such disease and is thereby disabled from earning full wages in his employment. The disablement is to be treated as the happening of the accident, and the date of disablement is to be the date which the certifying surgeon certifies as the date on which the disablement commenced, or if he is unable to certify such a date the date of the certificate. There was here no valid certificate until January 18, 1930, and until that date the appellant could not have known that he was suffering from a scheduled disease or that the happening of the accident was May 22, 1929. The fact that the claim for compensation was not made within six months from the date of disablement was due to the delay of the certifying surgeon, and for that delay the appellant ought not to be held responsible.

The certificate of November 19, 1929, intended to certify that the date of disablement was May 22, 1929, and if the omission of the word "May" had been corrected immediately by the certifying surgeon, as it should have been, the claim for compensation could have been made within the prescribed time, as the six months did not expire till November 22, 1929. The difficulty in these cases has arisen because the Legislature has attempted to apply a provision as to the time for making the claim, which was originally confined to accidents in the commonly accepted sense of the term, to industrial diseases: *Moore* v. *Naval Colliery Co.* (1) On the admitted facts, even assuming, contrary to the opinion of Cozens-Hardy M.R. in *Moore's* case (1), that the statutory limitation as to the time for making a claim applies in the case of an industrial disease where the date of disablement is fixed by the certificate more than six months back, the failure of the appellant was due to mistake or other reasonable cause.

[He also referred to *Victoria Insurance Co.* v. *Junction North Broken Hill Mine.* (2)]

Cyril Atkinson K.C. (with him *Edgar Dale* and *B. Ormerod*) for the respondents. It is the disablement which is going to give rise to a claim for compensation. The first person to know that he is in fact disabled is the workman. He must be assumed to know that if the disablement is the result of an industrial disease he will have a claim against his employer, and it is his duty to inform his employer and get a certificate as soon as possible. Otherwise the employer may be kept in a state of uncertainty for an indefinite time. On May 22, 1929, the appellant must have known that he was disabled, but for two months he did nothing. Then after the discovery that the first certificate was bad there was a further unexplained delay by the appellant's agent for more than two months. On the facts the arbitrator and the Court of Appeal were right in holding that the appellant had failed to show any reasonable cause for his failure to make a claim within the prescribed time.

Edward Cave K.C. in reply referred to *Lingley* v. *Thomas Firth & Sons* (3); *Luckie* v. *Merry* (4); *King* v. *Port of London Authority.* (5)

The House took time for consideration.

1931. July 6. LORD BLANESBURGH. My Lords, my noble and learned friend Lord Dunedin, who was absent from a portion of the argument, desires me to say that he associates himself with this judgment.

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(1) [1912] 1 K. B. 28, 31, 33.

(2) [1925] A. C. 354.

(3) [1921] 1 K. B. 655.

(4) [1915] 3 K. B. 83.

(5) [1920] A. C. 1.

This is an appeal against an order of the Court of Appeal confirming the finding of an arbitrator refusing compensation to the appellant for disablement from an industrial disease on the ground that no timeous claim had been made. In order to obtain compensation for the injury caused by an industrial disease, two requisites are necessary. There must be a certificate by the certifying surgeon of the district that the workman is suffering from a disease mentioned in the Third Schedule of the Act or a disease which has been brought under the head of industrial diseases by an Order of the Secretary of State, and that he is thereby disabled from earning full wages in the work in which he was employed; and the disease must be due to the nature of the employment in which the workman was employed at any time within the twelve months previous to the date of disablement. All this is provided for by s. 43 of the Act, and the section goes on to say that the disablement shall be treated as the happening of the accident and that the date of the disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or if he is unable to certify such a date then the date on which the certificate is given.

I may say in passing that I have purposely left out all reference to suspension under the regulations of the Factory and Workshop Act, 1901, as these provisions have nothing to do with the questions in this case. But there is another requisite before compensation can be obtained and that is under the provisions of s. 14, sub-s. 1, which says: "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury. . . . ."

From all this it is clear that the terminus a quo for the running of the six months being the happening of the accident, it is impossible to make a claim in respect of an industrial disease until there has been a certificate, for it is the certificate alone which, so to speak, brings the accident into being.

Now as to the facts of the present case. [His Lordship stated the facts as above set out.]

Now taking the claim as made on the head of the certificate as dated January 18, 1930, it is obvious that it is outside the six months from the date of disablement—namely, May 22, 1929. The six months expired on November 22, 1929.

In the case of *Moore* v. *Naval Colliery Co.* (1) Cozens-Hardy M.R. expressed an opinion thus : " Although I do not think it is necessary in the present case to decide this appeal on that ground, as at present advised I am clearly of opinion that it is not possible to hold in the case of an industrial disease, where, as the Act contemplates, the certificate may go back a long time, certainly twelve months, that a workman is disabled from presenting after the expiration of six months an application in which the date of the accident has to be stated, when the certificate, which alone fixes the date of the accident, may fix it more than six months back."

My Lords, I am not able to agree in this opinion. It would mean that in the case of industrial diseases the time limit for a claim is non-existent. It would perhaps have been better if Parliament, when it came to deal with industrial diseases, had modified the provisions as to the time limit for a claim, provisions which were made to fit ordinary accidents where no difficulty can arise. But it did not do so. It left the time limit expressed in s. 14 as it stands, and I think we must apply that to the case of industrial diseases as best we may. I think that was the view of Fletcher Moulton L.J. in *Moore's* case. He thought the case of hardship could always be met by the provision of s. 14, sub-s. 1 (*b*) : " The failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found

(1) [1912] 1 K. B. 28, 31, 33.

that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

Accordingly the real and only question in this case is whether there has been here a reasonable excuse for not making the claim within the period specified. That was the case as it presented itself to the arbitrator and to the Court of Appeal, and they came to the conclusion that they could not so hold.

My Lords, I do not say that there is not difficulty, but at the same time I have come, with reasonable satisfaction with my own judgment, to the opinion that there is enough to hold that there was a reasonable excuse. I am content to believe that the certifying surgeon appointed by the Government, in so far as professional skill is concerned, adequately fills his post, but as the filler up of a form he has shown himself a blunderer of the first water. He filled up the first certificate with a name of a disease which was not an industrial disease and he left it doubtful whether he was fixing the date of disablement or not. In the second certificate he put the date of disablement as "the 22nd day of 1929" and he took nearly two months to insert the word "May." Nor was the trade union agent who conducted the case for the appellant much better. He accepted the first useless certificate as if it was good and sent it to the employers. When he got it back again he realized it was bad, but for no real reason put off the fresh examination with a view to a fresh certificate from September 1 to November 19. It was this unexplained delay that lost him his client's case in the Courts below. I am only able to get over it by the consideration that, after all, on November 19, there was still time and the certificate might have been filled up in five minutes by the certifying surgeon, in which case there could have been made a claim in time. For the fact that it was not so made I do not think the appellant should be held to blame. I, therefore, come to the conclusion that here it is possible to say that the case falls within the words of s. 14, sub-s. 1 (*b*). I am not sorry to reach this result, because it is perfectly certain on the evidence that this man caught the severe disease from which he is suffering owing to the exposure to which he was subjected in the works of the respondents and nowhere else. But I trust it will be understood that delays are very dangerous and that this case must not be used as countenancing a workman sitting on in the knowledge of having caught a disease and doing nothing to make good his claim.

There is one other matter that must be mentioned. Counsel for the employers attempted to institute a cross-examination of the trade union secretary which should show that the date of disablement—namely, May, 1929, was really suggested by him and was not the spontaneous action of the certifying surgeon. The learned arbitrator very properly did not allow such a cross-examination to proceed. So far as he was concerned he was bound to take the certificate as he found it. He indicated that the question, if there was one, could be tried by certiorari. Without deciding whether certiorari would lie or not, as to which I give no opinion, I think it would be quite unnecessary. It is clearly a case where, if the employers really thought that the surgeon had simply yielded to the importunities of the trade union agent to insert a date which he had no right to insert, they should have appealed to the medical referee as to the certificate given.

I move your Lordships that the appeal be allowed and that the order of the Court of Appeal and the award of the arbitrator be set aside with costs here and below and the matter be remitted to the arbitrator to make an award of compensation to the appellant.

LORD WARRINGTON OF CLYFFE. My Lords, the only question calling for decision in this case is whether the failure of the appellant (the workman) to make a claim for compensation within six months from the occurrence of the accident was occasioned by reasonable cause. The arbitrator held that it was not so occasioned, and the Court of Appeal (the Master of the Rolls and Slesser and Romer L.JJ.) affirmed his decision. The workman appeals to this House.

The "accident" here is what I may call the statutory accident—namely, disablement by an industrial disease dealt

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with in Part II. of the Act of 1925. The following are the most material provisions: (1.) The disablement is to be treated as the "happening of the accident." (2.) The date of the disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced or, if he is unable to certify such a date, the date on which the certificate is given. (3.) The certificate given by the certifying surgeon is to be in the form prescribed in the Schedule to certain regulations made by the Secretary of State and having statutory force. (4.) The prescribed form directs that the disease from which the workman is said to be suffering is to be named according to the terms in which it is described in the Third Schedule to the Act or Order of the Secretary of State adding it to the Schedule. (5.) It also directs that if the surgeon is unable to certify a date on which the disablement commenced he is to strike out a certain part of the certificate—namely, the words "and I certify that the disablement commenced on the day of ."

The material facts and dates are as follows: The appellant is a man of upwards of sixty-one years of age. For seventeen years prior to June, 1928, he had been in the employ of the respondents as an operative cotton spinner. In that month he ceased to be so employed.

By an Order made by the Secretary of State in 1929 the following addition was made to the Third Schedule of the Act:—

Description of disease or injury.	*Description of process.*
13. (A). — Epitheliomatous cancer or ulceration of the skin due to tar, pitch, bitumen, mineral oil, or paraffin or any compound, product or residue of any of these substances.	Handling or use of tar, pitch, bitumen, mineral oil, or paraffin or any compound, product or residue of any of these substances.

On July 24, 1929, the certifying surgeon examined the appellant and gave him what purported to be a certificate under the Act. This document was not in fact a certificate under the Act at all, for it stated that the appellant was suffering from "epithelioma of the scrotum," not being a

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disease described in those terms by the Order of the Secretary of State. Moreover, it did not efficiently fix the date of disablement, inasmuch as the surgeon omitted to strike out the words "I certify that the disablement commenced on the day of ," the striking out of which is under the Regulations the equivalent of stating that he is unable to certify a date on which the disablement commenced, and struck out only the words "on the day of ," the omission of which by themselves is not so equivalent. For these defects the appellant was in no way responsible, nor was the trade union secretary by whom it has been found that at all material times the appellant was represented.

However, the trade union secretary, apparently in the erroneous belief that the certificate was sufficient, immediately gave a formal notice of the accident and made a claim for compensation. After some correspondence and negotiation the respondents, on or about September 1, 1929, returned the certificate to the secretary and repudiated the claim. They did so apparently on the ground that treating the date of the certificate as the date of disablement the disease was not due to the nature of any employment in which the workman was employed within the twelve months previous to that date.

In the month of August, 1929, the appellant became, and still is, an inmate of an infirmary, and is suffering from epitheliomatous cancer.

On November 19, 1929, he was again examined by the same certifying surgeon, but this gentleman did not sign or give to the appellant or his agent (the secretary) an effectual certificate until January 18, 1930. This last mentioned certificate duly complied with the Regulations as to the description of the disease, and certified that the disablement commenced on May 22, 1929. It will be observed that had it been given on November 19, 1929, there would have been time to make the claim within the statutory six months, which did not expire till November 22. The present claim was made on January 30, 1930. The only defence to it is that it was not made within the statutory six months, and the appellant replies that the failure to make it was occasioned by a reasonable cause.

I think the failure in question was really occasioned by the blunders and consequent delay on the part of the certifying surgeon. It was not until January 18, 1930, that the appellant knew the date from which the six months would run—namely, the date of the occurrence of the accident, and it was, of course, then impossible to make the claim within that time: see *Moore* v. *Naval Colliery Co.* (1), per Cozens-Hardy M.R. Much reliance was placed on a finding of the arbitrator that during the whole period from July 24, 1929, to January 18, 1930, the appellant and Whitworth, the trade union secretary, knew that the appellant had epitheliomatous cancer. But with all respect, this is not the point; the question is when did they, or either of them, first know the date of the occurrence (as it is called in s. 14) of the accident? This they knew for the first time on January 18, 1930, when the surgeon gave his certificate of that date certifying that disablement commenced on May 22, 1929. Delay, such as there was, prior to November 19 is immaterial, for the six months had not then expired, and if the certificate had been given on that day a claim might have been made in time. From the evidence of Whitworth, and from the certificate itself, it appears that on November 19 the surgeon sent to Whitworth a form of certificate incomplete and unsigned—incomplete, for, amongst other reasons, that no date was inserted, as that of the commencement of disablement. Whitworth states that on November 19 he asked the surgeon through the telephone to put in that date. There was some subsequent discussion between them on this subject, and at last the surgeon signed the certificate on January 18. The only conclusion I can come to is that the failure to make a claim was occasioned by the delay on the part of the surgeon, and if this be so then, so far as the appellant is concerned, the failure was occasioned by a reasonable cause.

The concluding remarks of Romer L.J. seem to show that he would have come to the same conclusion as I have had he realized that in truth the examination of November 19 was, as appeared by the certificate when it was at last signed, within a period which would have enabled the workman duly to have made his claim within the six months.

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(1) [1912] 1 K. B. 28.

For these reasons I am of opinion that the order of the Court of Appeal and the award of the arbitrator should be set aside with costs here and below, and the matter should be remitted to the arbitrator to make an award of compensation in the appellant's favour.

LORD ATKIN. My Lords, in this case the workman, an operative cotton spinner, on February 28, 1930, commenced arbitration proceedings against his employers for compensation in respect of total incapacity caused by an industrial disease, epitheliomatous cancer, due to mineral oil, or in other words spinners' cancer. He based his claim on a certificate by the certifying surgeon dated January 18, 1930, which certified the date of disablement to be May 22, 1929. He gave written notice of claim on January 30, 1930. By the provisions of the Act as to industrial diseases it is plain that the workman has no claim under the Act unless and until he has received a certificate from the certifying surgeon. Until then he has not met with an accident, which under the Act is the disability certified by the surgeon; and he does not know the date of the accident, for that is the date of the disability, which can be fixed only by the certifying surgeon. He cannot therefore give notice of the accident or make a claim until there is a certificate. By the provisions of s. 14 the claim must be made within six months from the occurrence of the accident. When, therefore, as in the present case, the date of disablement is fixed at a date more than six months earlier than the certificate, it is impossible to comply with the Act. The obligation to make a claim within the specified period is, however, subject to a proviso that the failure to make a claim within that period shall not be a bar if it is found that the failure was occasioned by mistake, absence from the United Kingdom or other reasonable cause. Two possible views emerge. Either the obligation to make a claim within six months does not exist where it is impossible in fact and in law to make any claim: or the failure to do what is impossible is excused, because impossibility is reasonable cause for not doing the impossible. I am bound to say that I prefer the first alternative—"Lex non cogit ad impossibilia." We are not dealing with the voluntary promise of an individual to do that which may turn out to be impossible. We are construing an Act intended to confer benefits on workmen in respect of a clause which is capable of having full operation in ordinary accidents and also in some notional accidents such as certified disability from industrial disease. When the words in the widest sense are capable of applying to cases where the obligation can be performed and to cases where the obligation cannot be performed, it seems to me a sound rule of construction to infer that the Legislature only intended to impose an obligation that could be performed. This is the view expressed, probably only as a dictum, by Cozens-Hardy M.R. in *Moore* v. *Naval Colliery*. (1) It is true that the result would be that in such a case there would be no limit of time for making a claim, but the provision as to notice would remain: and on the whole I think the Legislature, if they contemplated the matter at all, would be better satisfied with a remote disadvantage to the employer than an obvious absurdity in the case of the workman.

But though I hold this view, I am satisfied to deal with the present case on the footing that the latter alternative applies; and that the question is whether there is reasonable cause for failure to make the claim within six months. On this assumption the workman surely discharges the onus upon him of showing reasonable cause by proving that it was in fact and in law impossible to make the claim at any time before the certificate. I should again have thought this to be a complete and final discharge of the onus. But it is suggested that there is a further inquiry to be made—namely, whether the workman during the period of six months from the certified date of the disability has acted unreasonably in not procuring the certificate of the surgeon so as to procure

(1) [1912] 1 K. B. 28, 31.

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for himself a dated accident for which he can claim. My Lords, I am bound to say for myself that I cannot find such an obligation in the bond. Reasonable cause for failure to make a claim for an accident seems to me a different thing from reasonable cause for failure to make an accident. I therefore think that Farwell L.J. construed the section too rigorously when in *Moore* v. *Naval Colliery* (1) he said the question "is not so much whether the claim was unreasonably delayed, as whether the visit to the certifying surgeon was unreasonably delayed." The first question is within the scope of the sub-section: the second I cannot find in the sub-section. No doubt the result would be that a workman suffering from an industrial disease might delay getting the certificate and so delay for years the occasion for a claim. But in view of the fact that he would in the interval not be getting compensation, and would run the risk of not being able to prove that the disablement commenced within twelve months of his last employment, the practical disadvantage to the employer does not seem serious.

In the present case, however, it does not seem necessary to come to a final conclusion on this matter, for I agree with what I understand to be the unanimous opinion of your Lordships that, assuming that the question of unreasonable delay in getting the certificate arises, the workman nevertheless succeeds. I have little doubt that the workman and his trade union secretary and also the employers appreciated after the first certificate in July that the disease was an industrial disease. The certifying surgeon seems to have had a difficulty in steering his way through the necessary forms. The original certificate was defective: and I think that the substance of the matter is that the time till November was occupied in getting the certificate put right, which was eventually done, as far as the workman was concerned, on November 19, within the six months. I think, therefore, that this appeal should be allowed with costs here and below, the award for the respondents should be set aside, and the application should be remitted to the county court for the learned judge to award to the applicant the appropriate compensation.

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(1) [1912] 1 K. B. 35.

LORD THANKERTON. My Lords, in support of his claim to compensation under Part II. of the Workmen's Compensation Act, 1925, the appellant produces a certificate by the certifying surgeon dated January 18, 1930, which certifies that he is suffering from a scheduled industrial disease, that he is thereby disabled from earning full wages at the work at which he has been employed, and that the disablement commenced on the 22nd day of May, 1929. He thus satisfies the initial condition of sub-s. 1 of s. 43 of the Act.

The appellant's last employment was with the respondents, and that employment ceased on June 15, 1928; it is not now disputed that the appellant's disease is due to the nature of that employment, and he therefore satisfies the remaining conditions of sub-s. 1 of s. 43, there being no suggestion of any false representation by him which would disqualify him under head (*b*) of the sub-section.

But the appellant must also satisfy the requirements of s. 14 as to notice of the accident and the making of the claim for compensation. No question is raised as to want of notice of the accident, but the issue in the appeal is as to the appellant's failure to make his claim for compensation within the statutory period. Under s. 14 such claim requires to be given "within six months from the occurrence of the accident" provided that the "failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

In the case of an industrial disease the date of disablement fixed by the certificate of the certifying surgeon is to be treated as the date of the "happening of the accident": s. 43, sub-s. 1 (*a*). In the present case, as the certificate given on January 18, 1930, fixed the date of disablement as May 22, 1929—more than six months previously—the appellant has to rely on the proviso to s. 14, and asks the Court to hold that his failure to make his claim within the six months was occasioned by "reasonable cause."

As has been observed, the difficulty in these cases arises from the fact that the workman cannot know the date from which the six months begin to run until that date is fixed by the certificate of the certifying surgeon, and Parliament has not recognized the awkwardness of applying s. 14, which was originally framed only for the purpose of ordinary cases of injury by accident, to cases of industrial disease, except to the extent that proviso (*b*) of s. 14, sub-s. 1, was added to the section at the same time as industrial diseases were brought under the Act in 1906.

I agree that primarily it is for the workman to prove the "reasonable cause," and that unreasonable delay in presenting himself for examination by the certifying surgeon is an element to be taken into consideration by the Court, but in the present case the workman presented himself for examination on July 24, 1929, although that examination resulted in a certificate so badly bungled by the surgeon as to be totally ineffective. The period intervening between that date and the next examination was partly occupied by negotiations with the respondents and otherwise may reasonably be attributed to the effects of the bungling of the surgeon and the inattention or inefficiency of Mr. Whitworth, who was acting on behalf of the appellant who, in August, had gone into hospital, where he still remained when the present proceedings were taken. But the second, and last, examination of the appellant took place on November 19, 1929, which was sufficiently within the six months to enable the claim to be made within that period, if the certificate had been promptly given by the surgeon. The surgeon did not give a complete and valid certificate until January 18, 1930, and in the view which I hold as to the cause of that delay I find it unnecessary to consider whether the inefficiency of a person purporting to act on behalf of a workman, who is lying in hospital, may be a legitimate element to take into consideration as affording a reasonable explanation of delay by the workman or not, and I desire to reserve any opinion on that point.

On the question of the delay from November 19, 1929, to January 18, 1930, the facts have been sufficiently dealt with by your Lordships, and I agree with the conclusion that the delay was occasioned by the surgeon, which, so far as the appellant is concerned, affords a reasonable cause for his delay, and I do not regard the fact that formal notice of the claim was not sent until January 30 as materially affecting the point in this case.

I therefore concur in the motion proposed.

Order of the Court of Appeal reversed and award of the arbitrator set aside, and cause remitted back to the arbitrator with a direction to assess the amount of the compensation due to the appellant. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, July 6, 1931.

Solicitors for the appellant: *Church, Adams, Tatham & Co., for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for the respondents: *Gregory, Rowcliffe & Co., for John Taylor & Co., Manchester.*

[PRIVY COUNCIL.]

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RICE . . . . APPELLANT;

AND

CHRISTIANI AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Patent—Validity—Knowledge or User prior to Patentee's Invention—Knowledge or User outside Canada—Knowledge or User without Public Disclosure—Patent Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 23, *Dom.*), *s.* 7, *sub-s.* 1.

By s. 7, sub-s. 1, of the Patent Act, 1923, of Canada, any person who has invented any (inter alia) new and useful art, process, machine or manufacture "not known or used by others before his invention thereof," and as to which other specified circumstances do not exist, may obtain a patent granting him an exclusive property in the invention:—

Held, that the knowledge or user by others contemplated by the words quoted above is not confined to knowledge or user within Canada, nor to knowledge or user of a public or open character excluding that which is secret or confidential. In construing the provision the natural and ordinary meaning of the words should not be departed from in order to reconcile it with any theory of patent law evolved otherwise than from the language of the Act itself.

Canadian General Electric Co. v. *Fada Radio, Ld.* [1930] A. C. 97 referred to.

Reg. v. *La Force* (1894) 4 Can. Ex. C. R. 14 disapproved.

Judgment of the Supreme Court of Canada [1930] S. C. R. 443 affirmed.

APPEAL (No. 114 of 1930) by special leave from a judgment of the Supreme Court of Canada (May 9, 1930) reversing a judgment of the Exchequer Court of Canada (March 9, 1929).

The respondents, who were the assignees of a Canadian patent (No. 265601) granted to E. C. Bayer, brought an action against the appellant in the Exchequer Court of Canada for a declaration that a Canadian patent (No. 252546) granted to him on August 11, 1925, was invalid. The patents in question related to cellular building material and the process of making it. The grounds upon which the appellant's patent were attacked were, shortly stated, that before the appellant made his invention, the invention was known and used by Bayer and others in Denmark, and that in those circumstances a valid patent could not be granted to the appellant having regard to s. 7, sub-s. 1, of the (Canadian) Patent Act, 1923 (13 & 14 Geo. 5, c. 23).

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* *Present:* LORD SANKEY L.C., LORD BLANESBURGH, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and SIR LANCELOT SANDERSON.

The facts and the terms of the above sub-section appear from the judgment of the Judicial Committee.

The President of the Exchequer Court (McLean J.), who tried the action, found that although Bayer had conceived the idea of the invention, he had not applied it in a manner such as constituted a patentable invention. On that ground he dismissed the action without finding it necessary to consider the effect of the words " not known or used by others before his invention thereof " in s. 7, sub-s. 1, of the Act.

Upon appeal to the Supreme Court of Canada the decision was reversed by a judgment delivered by Rinfret J. and concurred in by Anglin C.J. and Duff, Newcombe and Lamont JJ.; the appellant's patent was declared to be invalid and ordered to be cancelled. The learned judges found that before the date of the appellant's invention the manufacture or process covered by his specification was known and used in Denmark by Bayer and three other persons to whom he had communicated it, and that as the effect of the words above quoted from s. 7, sub-s. 1, of the Patent Act, 1923, the appellant's patent was invalid. The appeal is reported at [1930] S. C. R. 443.

1931. May 4, 5, 7, 8. *J. Whitehead K.C.* and *Russel Smart K.C.* for the appellant. The words " not known or used by others before his invention thereof " in s. 7, sub-s. 1, of the Patent Act, 1923, should not be interpreted as applying to knowledge which has not been made available to the public, or to private or secret use, nor to knowledge or use elsewhere than in Canada. By later provisions in the sub-section neither publication outside Canada, nor public use anywhere, within two years of an application, is in itself a bar to the grant of a patent. Those provisions, favourable to a patentee, are not consistent with the view that the earlier words include knowledge or use which was outside Canada and was not made available to the public. That view would make it impossible to say with certainty whether any Canadian patent was valid. The provision now in question is to be found, with verbal variations, in successive Canadian Patent Acts since 1849 (1), and is analogous to the provision in s. 2 of the Statute of Monopolies (21 Jac. 1, c. 3), which precludes the grant of a patent except in respect of a new manufacture "which others . . . . shall not use." That provision has been interpreted uniformly by English Courts as referring only to public user within the realm: per Jessel M.R. in *Plimpton* v. *Malcolmson* (2), and per Parker J. in *Robertson* v. *Purdey.* (3) Before the judgment now appealed from the judicial view in Canada was that "known and used" in the Canadian statute referred to knowledge and user of a public nature: *Reg.* v. *La Force* (4); *Gerrard Wire Tying Machines Co. of Canada* v. *Cary Manufacturing Co.* (5) Although the first of those decisions was in 1894, the legislature has made no material alteration in the words used. The present decision of the Supreme Court was based upon a misinterpretation of a passage in the judgment of the Board in *Canadian General Electric Co.* v. *Fada Radio, Ld.* (6) In any case, the observations relied on were obiter. No question arose in that case, nor in *Wright & Corson* v. *Brake Service, Ld.* (7), which was being discussed, as to the character of the knowledge and user. Strictly, the observations were obiter also as to the locality of the knowledge, because the Board found that the patentee's knowledge was prior to that of those attacking the patent. It is true that "as a mere question of construction of the section" of the Act of 1906 "their Lordships were not prepared to differ from" the decision in *Wright & Corson's* case. (7) The appellant contends that that case was wrongly decided,

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(1) The terms of the Canadian Patent Acts of 1849, 1859, 1869, 1872, and of the Acts contained in the revised Statutes of 1886 and 1906, appear from the judgment.

(2) (1876) 3 Ch. D. 531, 556.

(3) (1907) 24 R. P. C. 273, 290, 291.

(4) (1894) 4 Can. Ex. C. R. 14.

(5) [1926] Can. Ex. C. R. 170, 181, 182.

(6) [1930] A. C. 97, 106, 107.

(7) [1926] S. C. R. 434.

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not because of the words "in Canada" later in the section, but upon the ground that according to the true principles applicable prior knowledge and user outside Canada does not invalidate a patent. If the observations of the Board have the meaning given them by the Supreme Court they appear to conflict with the judgment of the Board in *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills.* (1) Even if the appellant is wrong as to the meaning of the words "known and used by others" the appeal should be allowed on the ground that the trial judge rightly found on the evidence that before the appellant's invention Bayer had not applied the idea in a sufficiently definite and practical manner to constitute knowledge of the invention covered by the appellant's patent: *Permutit Co.* v. *Borrowman.* (2)

Herridge K.C. for the respondents. The principles of patent law in Canada differ fundamentally from those in England. In Canada the applicant must be the first inventor in Canada or elsewhere. The fact of the invention is kept distinct from publication of it. The words "known and used by others" prescribe circumstances which, as evidence, preclude an applicant from being the first inventor and so entitled to a patent. In the Act of 1859 the words "in this Province" occurred after "known and used," but they have been omitted in subsequent Acts. After using the words which have to be construed, the sub-section deals with publication before the application, the object of that provision being to insure that the inventor applies within a reasonable time. The words "known and used by others before his invention thereof" are free from ambiguity. In construing them it should not be assumed that the Canadian Patent Acts were based upon the Statute of Monopolies or the principles of patent law in England, rather than the principles of patent law in the U.S.A., which differ from them materially. [Reference was made to Robinson on Patents, 1890, vol. i., pp. 31, 91; Walker on Patents, p. 66; Waite on Patents, pp. 79, 85; and to *Reed* v. *Cutter.* (3)] The decision in

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(1) [1929] A. C. 269, 281.
(2) (1926) 43 R. P. C. 356.
(3) (1841) 1 Story, 590, 599.

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Reg. v. *La Force* (1) and the observations in *Gerrard Wire Tying Machines Co. of Canada* v. *Cary Manufacturing Co.* (2) were contrary to the true principles of patent law in Canada and were erroneous. In *Canadian General Electric Co.* v. *Fada Radio, Ld.* (3), the Board were not prepared to differ from *Wright & Corson* v. *Brake Service, Ld.* (4), upon the territorial question; that the Act of 1906 contained at a later point the words "in Canada" does not affect the decision. The observations as to knowledge or user which has not been made public were relevant to the question under consideration and directly conflict with *Reg.* v. *La Force.* (1) Upon the facts the Supreme Court rightly found that Bayer's specification and the verbal evidence established knowledge and user, at a date earlier than the appellant's invention, of all that was covered by the appellant's patent. [Reference was made also to *Smith* v. *Goldie* (5) and *Barnet McQueen Co.* v. *Canadian Stewart Co.* (6)]

Russel Smart K.C. in reply. The respondents' construction of the material words conflicts with the principles of patent law in the U.S.A. as well as in England. It is contrary to public policy that an inventor's patent should be void because of prior knowledge or user which has been kept secret.

June 26. The judgment of their Lordships was delivered by

LORD TOMLIN. The action out of which this appeal arises was brought by the respondents against the appellant in the Exchequer Court of Canada for a declaration that a patent granted to the appellant (No. 252546) was invalid, null and void.

In the Exchequer Court the respondents failed, but the Supreme Court of Canada, on May 9, 1930, reversed the trial judge and declared the patent to be invalid and void.

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(1) 4 Can. Ex. C. R. 14.

(2) [1926] Can. Ex. C. R. 170, 181, 182.

(3) [1930] A. C. 97, 106, 107.

(4) [1926] S. C. R. 434.

(5) (1882) 9 Can. S. C. R. 46; on app. from 7 Ont. A. R. 628.

(6) (1910) 13 Can. Ex. C. R. 186, 226, 229.

Against the conclusion of the Supreme Court the appellant by special leave now appeals to His Majesty in Council.

The invention covered by the patent relates to cellular building material and to the process of making the same.

The attack made upon the patent was in effect (1.) that before the appellant made his invention, such invention was known or used in Denmark by others—namely, one Bayer, a Dane, and those working with him, and (2.) that in these circumstances no patent could under the relevant Canadian statute be validly granted to the appellant.

The facts, so far as they are not in dispute, may be stated shortly as follows :—

Early in 1921, Bayer, in Denmark, conceived the idea of an invention which later he embodied in an application for a patent and made certain experiments in connection therewith.

During 1921 and 1922 a series of experiments were carried out on Bayer's behalf by certain Danish scientists, to whom a confidential disclosure of the invention had been made by Bayer.

On September 11, 1922, Bayer filed in Denmark an application for a patent in respect of the matter.

In October, 1922, the appellant, in the United States of America, without any knowledge of what Bayer was doing in Denmark, conceived a similar idea, and on December 21, 1922, filed in the United States of America an application for a patent.

On June 19, 1923, the grant of a patent was made in Denmark to Bayer.

On July 2, 1923, Bayer's patent was for the first time published in Denmark.

In the course of 1923, Bayer sold his invention to the respondents, who developed the same commercially in Denmark.

On June 13, 1924, the appellant filed in Canada an application for a patent to cover his invention.

On December 6, 1924, the respondents applied in Canada for a patent to cover Bayer's invention.

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On August 11, 1925, Patent No. 252546 impeached in these proceedings was granted to the appellant in respect of his application of June 13, 1924.

On November 9, 1926, a patent was also granted to the respondents in respect of their application of December 6, 1924.

The Canadian Patent Act of 1923 is the governing statute.

By s. 7 of that Act it is provided as follows: "7.—(1.) Any person who has invented any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvements thereof, not known or used by others before his invention thereof and not patented or described in any printed publication in this or any foreign country more than two years prior to his application and not in public use or on sale in this country for more than two years prior to his application may, on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property in such invention."

Before applying the provisions of the section to the case, it is necessary to ascertain the following facts—namely: First, whether there is substantial identity between the manufacture or process invented by Bayer and the manufacture or process invented by the appellant. Secondly, if there is substantial identity, whether Bayer, with the help of his associates, had so progressed in the development of his invention before the appellant's invention was made that it can be said that the manufacture or process the subject of both inventions, was first known or used by Bayer and his associates.

It is not in dispute that the date of the filing of the appellant's specification in the United States of America—namely, December 21, 1922, ought, for the purposes of this case, to be treated as the date of his invention.

The first step is to examine and compare as on that date the inventions claimed to have been made by Bayer, and by the appellant respectively.

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The subject of both inventions is a cellular substance made of cement or other similar material mixed before setting with a solution mechanically whipped into a foam so that the bubbles in the foam form cellular voids in the mixture when set. It is claimed that the result is a building material combining lightness with high insulating qualities in respect of heat and sound.

An examination of the appellant's specification discloses the nature of his invention, and it is convenient to state here the material passages in such specification. [The judgment set out the material parts of the appellant's specification, and the specification filed by Bayer in Denmark on September 11, 1922, and proceeded as follows:—]

The oral evidence adduced by the respondents was directed to showing that Bayer early in 1921 had produced specimens of cellular material by mixing cement with foam formed of soap, that prior to September 11, 1922, and thereafter many experiments had been made by Bayer and those assisting him for improving the manufacture, and that anyone familiar with the art could produce the material from the description contained in Bayer's specification.

Some evidence was called by the appellant of unsuccessful attempts made to carry out the directions contained in Bayer's specification with a view to establishing that there was, in fact, so far as Bayer was concerned, no invention reduced to a definite and practical shape.

The learned trial judge found that "Bayer preceded Rice in his conception of his alleged invention and in his experimental work developing the same." He thought, however, that Bayer's Danish specification did not contain as full a description of the invention as was necessary upon an application for a patent under Canadian law, and for this reason he treated Bayer's invention as incomplete and as affording no ground for displacing the appellant's patent.

Their Lordships are of opinion that the learned judge did not propound or determine the proper issue. That issue is not whether Bayer's specification contained such a description of the invention as upon an application for a Canadian patent would satisfy the requirements of Canadian law, but whether before December 21, 1922, when the appellant filed his specification in the United States of America, the manufacture or process covered by that specification had already been discovered by Bayer and was known or used by him and his associates.

Their Lordships are of opinion that having regard to the specifications and the oral evidence adduced, the finding upon the issue defined as already indicated must be that prior to December 21, 1922, the manufacture or process covered by the appellant's specification had been discovered by Bayer and was, in fact, known and used by him and his associates.

It was admittedly common knowledge that a stable foam could be made out of many well known mucilaginous substances. In their Lordships' judgment, the evidence adduced establishes that the description in Bayer's specification was sufficient to enable a competent workman to carry out the manufacture or process described therein, and their Lordships are unable to find any material distinction between that manufacture or process and the manufacture or process described in the appellant's specification. This conclusion accords with that reached by the Supreme Court upon the facts of the case.

It remains to consider the question of law, whether the fact that before December 21, 1922, the date of the applicant's invention, Bayer had discovered the same manufacture or process in Denmark and disclosed it confidentially to others, makes it impossible for the appellant to say that his manufacture or process was " not known or used by others before his invention thereof " within the meaning of s. 7 of the Canadian statute.

On the one hand, it is urged by the appellant that the knowledge or user by others contemplated by the section must be (1.) knowledge or user by persons in Canada, and (2.) knowledge or user which is not confidential but is disclosed so as to be available to the public. Any other view of the matter would, it is contended, be inconsistent with

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the fundamental conception of patent law—namely, that the consideration for the grant of the monopoly is the disclosure of the invention for the ultimate benefit of the public of the State making the grant.

The respondents, on the other hand, contend that in accordance with the ordinary principles of construction the words of the statute must be given their natural and ordinary meaning, and that there is nothing in the context which justifies a departure from such natural and ordinary meaning ; that the alleged fundamental conception of patent law is derived from the Statute of Monopolies, which forms no part of the Canadian law ; and that the matter is already concluded by authority against the appellant.

In support of the respondents' view, the attention of their Lordships' Board has been called to the American patent law, from which the Canadian law is said to have been derived, and also to the changes which have been made from time to time in the language of Canadian statutes relating to patents.

It may be true that the framers of the earlier Canadian statutes relating to patents looked for a model towards the American law rather than towards the English law, but there are marked differences between the American and Canadian statutes, and an examination of the development of American patent law is not of assistance in construing the language of the statute now under consideration.

Some guidance is, however, to be obtained from an examination of the changes which have been from time to time made in the Canadian law itself.

In 1849, after the Union of Upper and Lower Canada, a consolidating Act (12 Vict. c. 24) was passed which contained a section in the following terms : " Any person being a subject of Her Majesty, and resident in this Province, having discovered or invented any new and useful art, machine, manufacture, or composition of matter—or any new and useful improvement on any art, machine, manufacture, or composition of matter—the same not being known or used in this Province by others before his discovery or invention thereof, and not being at the time of the application for a patent in public use or on sale in this Province with his consent or allowance as the inventor or discoverer thereof—and desiring to obtain an exclusive property therein—may apply by petition, in the manner provided by this Act, to the Governor of this Province, expressing such desire."

This section was re-enacted in 1859, but in 1869, after Confederation, an Act (32 & 33 Vict. c. 11) was passed to regulate patent law in the Dominion, and upon this Act all later legislation has been based.

Sect. 6 of the Act of 1869 was as follows: "6. Any person having been a resident of Canada for at least one year next before his application, and having invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement on any art, machine, manufacture or composition of matter, not known or used by others before his invention or discovery thereof or not being at the time of his application for a patent in public use or on sale in any of the Provinces of the Dominion with the consent or allowance of the inventor or discoverer thereof, may, on a petition to that effect presented to the Commissioner and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property therein."

In 1872 there was a new Act (35 Vict. c. 26) in which s. 6 of the Act of 1869 appeared in the following form: "6. Any person having invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his invention thereof, and not being in public use or on sale for more than one year previous to his application, in Canada with the consent or allowance of the inventor thereof, may, on a petition to that effect presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property therein."

The Act of 1872 was replaced in 1886 by an Act (R. S. Can. 1886, c. 61), s. 7 of which reproduced s. 6 of the Act of 1869 in the following form: "7. Any person who has invented any new and useful art, machine, manufacture or composition of matter of any new and useful improvement in any art, machine, manufacture or composition of matter, which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previous to his application for patent therefor in Canada, may on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property in such invention."

In the next revision, in 1906 (R. S. Can. 1906, c. 69), s. 7 of the Act of 1886 reappeared unaltered, but in the final revision of 1923 (R. S. Can. 1923, c. 23) the section assumed the form which has been already stated and which governs this case.

Two things may be noted in connection with these changes: first, that the territorial limitation placed by the Act of 1849 upon the words "not being known or used" was dropped in the Act of 1869 and has never reappeared; and secondly, that the phrase "not being known or used by others" was used up till 1886, when the words "by any other person" were substituted for the words "by others." In 1923, however, there was a return to the original phrase "by others."

As to the point of territorial limitation, the language of the section now in force does not, in their Lordships' opinion, admit of the introduction of any such limitation to the words "not being known or used." It would not be permissible to import the limitation in order to reconcile the section with any theory of patent law evolved otherwise than from the language of the Act itself. Indeed, the history of the legislation suggests deliberate exclusion of any such limitation. This conclusion accords with the view indicated in the judgment of their Lordships' Board delivered by Lord

Warrington of Clyffe in the *Canadian General Electric Co.* v. *Fada Radio, Ld.* (1)

With regard to the nature of the knowledge or user contemplated by the section if the matter is to be determined upon the natural and ordinary meaning of the words employed, it is impossible, in their Lordships' judgment, to confine the knowledge or user to such as is of a public or open character or to exclude such knowledge or user as is secret or confidential. Their Lordships can find no valid ground based upon the context or otherwise for departing from the natural and ordinary meaning of the words.

It is true that in the Exchequer Court of Canada, in 1894, Burbidge J., in *Reg.* v. *La Force* (2), when the Act of 1886 was in force, reached a contrary conclusion, and that in *Gerrard Wire Tying Machines Co. of Canada* v. *Cary Manufacturing Co.* (3), where the Act of 1906 governed, there were dicta in favour of the view adopted by Burbidge J. It is also true that the Patent Act of 1923, passed long after the decision in *Reg.* v. *La Force* (2), made no material alteration in the relevant section. In this connection it may be observed that the alteration of the words "by any other" to the words "by others," has, in their Lordships' opinion, no bearing upon the point now under consideration.

In their Lordships' judgment, *Reg.* v. *La Force* (2) was wrongly decided, and the fact that after that decision the relevant section was re-enacted substantially unaltered, cannot, as a matter of construction, justify a departure from the natural and ordinary meaning of the words of the re-enacted section.

It must be recognized that upon this view of the matter the patent law of Canada differs radically in principle from the patent law of England. Whether this difference is advantageous or disadvantageous, and if disadvantageous, whether a change is desirable, are matters for the consideration not of Courts of construction but of the legislature.

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(1) [1930] A. C. 97.
(2) 4 Can. Ex. C. R. 14.
(3) [1926] Can. Ex. C. R. 170.

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Their Lordships' conclusion therefore is that the knowledge and user of Bayer and his associates, before December 21, 1922, although in Denmark and although secret and confidential, and not made available to the public, was, upon the true construction of s. 7 of the Act of 1923, sufficient to invalidate the appellant's patent.

It was submitted on the appellant's behalf that even thus, his patent ought to have been treated as valid in respect of his claims 13 to 18 inclusive, and s. 31 of the Act of 1923 was prayed in aid.

That section is as follows: "31.—(1.) A patent shall be void if any material allegation in the petition or declaration of the applicant hereinbefore mentioned in respect of such patent is untrue or if the specifications and drawings contain more or less than is necessary for obtaining the end for which they purport to be made when such omission or addition is wilfully made for the purpose of misleading. (2.) If it appears to the Court that such omission or addition was an involuntary error and if it is proved that the patentee is entitled to the remainder of his patent pro tanto, the Court shall render a judgment in accordance with the facts, and shall determine as to costs and the patent shall be held valid for such part of the invention described as the patentee is so found entitled to."

Their Lordships are unable to see that s. 31 has any application to the present case. It is admitted that there is no other section of the Act under the terms of which the claims in question can be saved.

In the result, therefore, their Lordships are of opinion that the decision of the Supreme Court was correct, and that the appeal fails and ought to be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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July 10.

CHIEF TSCHEKEDI KHAMA . . . APPELLANT;

AND

S. RATSHOSA AND ANOTHER . . . . RESPONDENTS.

ATTORNEY-GENERAL . . . . . INTERVENER.

ON APPEAL FROM THE SPECIAL COURT OF THE BECHUANALAND PROTECTORATE.

Bechuanaland Protectorate—Jurisdiction of Courts—Proclamation—Matter in which Natives only concerned—Armed Rebellion—Houses burnt by Order of Chief—Tribal Custom—Action for Damages.

By a proclamation issued in 1891 pursuant to the Foreign Jurisdiction Act, 1890, Magistrates' and other Courts were established in the Bechuanaland Protectorate. By cl. 8 the jurisdiction of the Courts was not to extend to any matter in which natives only were concerned, unless exercise of the jurisdiction was necessary in the interests of peace, or for the prevention or punishment of acts of violence. By cl. 9 where jurisdiction was exercised the decision was to follow the laws and customs of the natives concerned, unless those laws and customs were incompatible with peace, order, and good government.

Three natives were parties to an armed and murderous attack upon their tribal chief. As punishment the chief, after consulting and with the approval of his native council, caused their houses to be burnt. The action of the chief was in accordance with the custom of the tribe in the case of an armed rebellion. Two of the natives were convicted by a Magistrate of attempted murder, and sentenced to imprisonment; the sentences were reduced, as the houses of the accused had been burnt. Subsequently the three natives brought civil suits in the Magistrates' Court against the chief for damages in respect of the house burning, and the chief counterclaimed.

Held, that the Court had no jurisdiction in the civil suits having regard to cl. 8 of the proclamation, as the matter was one in which natives only were concerned, and there was no evidence of the probability of any further breach of the peace or acts of violence.

Semble, that the custom of house burning, above referred to, was incompatible with peace, order, and good government within the meaning of cl. 9.

Judgment of the Special Court of the Bechuanaland Protectorate reversed.

APPEAL (No. 4 of 1930) from that part of judgment of the Special Court of the Bechuanaland Protectorate (September 20,

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* *Present:* LORD SANKEY L.C., LORD BLANESBURGH, LORD TOMLIN, and SIR LANCELOT SANDERSON.

1929) which set aside and varied judgments of the Resident Magistrate at Serowe (March 29, 1928).

The appeal raised questions as to the jurisdiction of Courts established in the Bechuanaland Protectorate by a proclamation issued in 1891 by the High Commissioner of South Africa under the authority of an Order in Council pursuant to the Foreign Jurisdiction Act, 1890.

The facts of the case, and the material provisions of the proclamation, appear from the judgment of the Judicial Committee.

The appeal from the Resident Magistrate to the Special Court was under cl. 3 of Proclamation No. 2 of 1896, as varied by cl. 3 of Proclamation No. 11 of 1928.

The present appeal was heard in part in October, 1930, the respondents not appearing. Their Lordships adjourned the hearing in order that the Secretary of State for the Dominions might have an opportunity to place his views before the Board. Subsequently His Majesty's Attorney-General obtained leave to intervene.

1931. May 14, 15. *Hon. Geoffrey Lawrence K.C., F. O. Langley* and *Mallalieu* for the appellant. The evidence shows (1.) that the appellant ordered the house burning after consulting with his council and with their unanimous approval; (2.) that the punishment so administered was in accordance with the custom of the tribe in the case of armed rebellion. Official documents, and the proclamation itself, show that the maintenance of law and order among the natives was left in the hands of the chiefs. Subject to the proclamation the internal sovereignty of the appellant as chief was not affected by the protectorate: Jenkins' British Rule and Jurisdiction beyond the Seas, p. 165. The house burning was in execution of a lawful order by the appellant as chief, and was not justiciable by any Court at the suit of his subjects: *The Parlement Belge.* (1)

[*Wilfrid Lewis*, for the Attorney-General, produced to the Board a letter on behalf of the Secretary of State for the Dominions to the effect that the appellant was not recognized by His Majesty's Government as having sovereign rights, and referred to *Duff Development Co.* v. *Government of Kelantan.* (1)]

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(1) (1880) 5 P. D. 197, 207.

That statement might be conclusive in an action in England if there was a claim based upon an alleged sovereignty. But here if the Court had jurisdiction it was bound to follow native law and custom, and the custom was proved. The maintenance of law and order among the natives having been left in the hands of the chiefs, the native customary punishment for armed rebellion cannot be treated as being incompatible with peace, order, and good government. The Magistrate did not find that it was necessary to exercise jurisdiction for any of the reasons stated in cl. 8. [Reference was made also to *Rex* v. *Earl of Crewe.* (2)]

Wilfrid Lewis for the Attorney-General, intervener. In the view of the Dominions Office the Magistrate rightly considered that he had jurisdiction. In cl. 8 of the proclamation the word "natives" includes a native chief, but the matter was one in which it was necessary to exercise jurisdiction in the interests of peace and to prevent further acts of violence. The Magistrate must be presumed to have been of that opinion although he recorded no finding to that effect: *Knowles* v. *The King.* (3) Although the proclamation did not take away the jurisdiction of the chief in matters between natives, it limited it by transferring to the Courts established matters of a certain kind, even if a chief was one of the parties. The appellant did not contend before the Magistrate that there was no jurisdiction under the proclamation, but that the act complained of was a judicial act; he submitted to the jurisdiction by counterclaiming. The house burning cannot be regarded as a judicial act, as there was no trial or decision of a Court. If any custom was proved it did not justify the burning in the circumstances of the case. In any event it is submitted that the custom, if proved, was incompatible with peace, order, and good government, within the meaning of cl. 9.

The respondents did not appear.

(1) [1924] A. C. 797.

(2) [1910] 2 K. B. 576.

(3) [1930] A. C. 366.

July 10. The judgment of their Lordships was delivered by

SIR LANCELOT SANDERSON. This is an appeal by Chief Tschekedi Khama, hereinafter called the appellant, from that part of a judgment dated September 20, 1929, of the Special Court of the Bechuanaland Protectorate, holden in appeal at Lobatsi, which set aside and varied the judgments of the Resident Magistrate given at Serowe on March 29, 1928.

The appellant was the defendant in three suits instituted by the respondents, Simon and John Ratshosa, and their brother Obeditse, respectively, on December 5, 1927, in the Court of the additional Resident Magistrate for the Ngwato District of the Bechuanaland Protectorate. Each suit contained several claims. The first claim in each suit was in respect of the destruction by burning of certain houses and huts belonging to the plaintiffs situate at Serowe and their contents, for which the plaintiffs alleged that the appellant was liable. It is not necessary to refer to the other claims in detail, inasmuch as the Magistrate who tried the suits dismissed these claims and with one immaterial modification the Magistrate's judgment in respect thereof was affirmed by the Special Court on appeal and there is no cross-appeal before the Board.

The appellant denied liability on all claims and filed counterclaims against Simon and Obeditse. The Magistrate who tried the cases entered judgment for the appellant in respect of all the claims of the plaintiffs, and upon the appellant's counterclaims he directed that Simon and Obeditse should each pay the appellant 500*l.* damages and half of certain medical expenses.

Obeditse did not appeal. Simon and John appealed, and the Special Court on appeal affirmed in substance the decision of the Magistrate in respect of all the claims made by Simon and John, except their claims in respect of the destruction of their houses and huts and their contents. In respect of those claims the Special Court ordered judgment to be entered for Simon and John and directed that the amount of damages should be determined by a Magistrate sitting with assessors. The judgment of the Magistrate against the plaintiff Simon on the appellant's counterclaim was altered by the Special Court to judgment for 150*l.*, which sum was to include the amount paid as medical expenses.

From the above mentioned judgment of the Special Court the appellant has by leave appealed to His Majesty in Council.

It was submitted by the appellant that judgment should be entered for him on the ground that the Courts had no jurisdiction, and that if and so far as the Resident Magistrate had jurisdiction his judgments were right upon the matters which are the subject of the appeal to His Majesty in Council and should be restored.

At the hearing of the appeal by the Board the respondents. Simon and John Ratshosa, did not appear, and inasmuch as the appeal raised questions of importance, the hearing was adjourned in order that an opportunity might be given to the Secretary of State of placing his views upon the questions at issue before the Board.

In pursuance of leave granted on February 12, 1931, His Majesty's Attorney-General intervened, and was represented by counsel at the hearing of the appeal.

The material facts which relate to the matters in issue on appeal before the Board are as follows:—

By arrangement with certain chiefs in Bechuanaland, of whom Khama was one, a protectorate was proclaimed over their territories in the year 1885. By an Order in Council dated May 9, 1891, made by virtue and in exercise of the powers by the Foreign Jurisdiction Act, 1890, vested in Her Majesty Queen Victoria, the limits of the protectorate were defined.

Amongst other things, it was thereby provided by cl. 4 that: "In the exercise of the powers and authorities hereby conferred upon him the High Commissioner may, amongst other things, from time to time by Proclamation provide for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons within the limits of this Order, including the prohibition and punishment of acts tending to disturb the public peace."

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Accordingly a proclamation was made by the High Commissioner for South Africa on June 10, 1891.

In the preamble it is recited that among the powers conferred and committed to the High Commissioner is: "The power of appointing and removing Resident Commissioners, Assistant Commissioners, Judges, Magistrates and other officers, with such powers and authorities as the High Commissioner may assign, subject to the provisions of the said Order; And whereas, moreover, the High Commissioner is by the said Order empowered, with due respect for native laws and customs, to provide by Proclamation, from time to time, for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons within the limits of the said Order, including the prohibition and punishment of acts tending to disturb the public peace:"

The material clauses are as follows:—

"1. There shall be one or more Resident Commissioners, who shall be appointed by commission under the hand and seal of the High Commissioner, each of whom shall, within such parts of the territories comprised within the limits of the said Order in Council as shall be assigned to him, exercise such administration and control, and shall be invested with all such powers, authorities and jurisdiction as may be by law, including this Proclamation, and by the terms of his commission conferred upon or committed to him, subject always to the directions and instructions of the High Commissioner."

"4. The High Commissioner may appoint such Assistant Commissioners or Magistrates as he may think necessary, and it shall be lawful for any Assistant Commissioner or Magistrate duly appointed for the said territory to hold a Court at such place or places as shall be fixed, and to exercise such jurisdiction as shall be conferred by law or defined in and by his commission."

"8. The jurisdiction of the Courts holden by Resident Commissioners, Assistant Commissioners or Magistrates under this Proclamation shall not extend to any matter in which natives only are concerned, unless in the opinion of such Court the exercise of such jurisdiction is necessary in the interests of peace, or for the prevention or punishment of acts of violence to person or property."

"9. In every matter wherein jurisdiction is exercised by any such Court under the last preceding section of this Proclamation, the decision shall follow the laws and customs of the natives concerned, in so far as they are applicable: provided that if such laws or customs conflict or are not clearly proved, or if such laws or customs should be found to 'be incompatible with peace, order and good government,' the Court may decide in accordance with the law which would regulate the decision if the matter in dispute concerned persons of European birth or descent."

"10. If any Native Chief shall request to be appointed to exercise jurisdiction, it shall be lawful for any Resident Commissioner within the limits assigned to him, subject to the sanction and approval of the High Commissioner, to appoint such Native Chief to adjudicate upon and try such cases, criminal or civil, and to exercise jurisdiction in such manner and within such limits as may be defined by any rules established by the authority of the Resident Commissioner, who is hereby empowered, with the approval of the High Commissioner, to make all such rules as may be necessary in that behalf; and to amend, alter, or cancel the same as he may think fit: Provided that no suit, action or proceeding whatsoever, to which any person of European birth or descent shall be a party, either as plaintiff or complainant, or as defendant or accused person, shall be adjudicated upon by any such Chief under this section, save by the consent of all parties concerned."

"14. The rules, orders and regulations respecting the manner and form of proceeding in civil and criminal cases before the Court of any Assistant Commissioner, or Magistrate, shall, mutatis mutandis, and as far as the circumstances of the said territory will admit, be the same as those in force for the time being with respect to Courts of Resident Magistrate in the Cape Colony."

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The area of the protectorate is about 275,000 square miles, and the territory over which Khama was chief is about 40,000 square miles. The British Government has no armed force in this reserve, and it looks to the Chief to preserve law and order within its boundaries.

Khama died in 1923 and was succeeded by Sekgoma, the brother of the appellant. On January 19, 1926, the appellant was installed as Acting Chief of the Bamangwato tribe during the minority of his nephew Seretsi.

Serowe, where the events about to be mentioned took place, is one of the six principal native villages of the protectorate and is situated about 225 miles from Mafeking. Their Lordships were informed that it has a population of about 30,000.

The respondents are relatives of the late Chief Khama and were called royal headmen.

It was alleged that the three Ratshosa brothers were insubordinate and from the first had defied the appellant's authority, and on April 5, 1926, the appellant summoned them to attend his "Kgotla," or council, to discuss with him and the Resident Magistrate certain questions with reference to some Masarwa girls then in the possession of the wife of one of the Ratshosas. The Ratshosa brothers ignored the summons, with the result that the "Kgotla" broke up and the Resident Magistrate went away. On the same day Simon Ratshosa's regiment was under orders from the appellant to parade for routine work on the roads. Simon failed to parade with them. Certain officers with an unarmed party were sent to fetch Simon, but the party met with resistance and Simon took shelter in the house of some relatives. There was evidence that John Ratshosa was threatening to kill some one on that day.

Later in the same day the appellant caused his "Kgotla" to reassemble and again summoned the Ratshosas to attend. This summons they obeyed, and they were asked to explain their conduct, and on their failing to do so satisfactorily the appellant ordered them to lie down and to be beaten. There was a scuffle: Simon and Obeditse escaped: John was caught and beaten.

It is clear from the evidence that Simon and Obeditse proceeded to arm themselves and that they returned to the "Kgotla"; Simon had a Mauser pistol and Obeditse had a rifle. They took cover behind some poles and started firing at the appellant and those near him in the "Kgotla." The appellant was wounded in the side of the abdomen; fortunately the wound was not dangerous. Two others at least were wounded; one received a dangerous wound in the hip. Thereupon there was great excitement and commotion. Simon and Obeditse fled to their houses, and the appellant ordered that they should be brought before him alive or dead.

Subsequently the people of the tribe were summoned. They assembled with their arms and moved off to carry out the appellant's orders. Fortunately for the Ratshosas the Resident Magistrate then arrived. He found an attack being made on the Ratshosas' houses, and at considerable risk to himself he intervened and succeeded in persuading the people to stop shooting. He obtained from the appellant a safe conduct for the three Ratshosas, and took them away to his own camp. There is little doubt that but for his efforts the three Ratshosas would have been killed.

Later in the same evening some of the houses and huts of the Ratshosas were burnt, and on the following morning some more houses belonging to the Ratshosa brothers were burnt. The contents also of the houses and huts were burnt.

The Magistrate who tried the case held that the appellant, as chief, with the unanimous consent of his councillors in "Kgotla" and people, ordered a regiment to burn down the plaintiffs' dwellings as they stood. The Special Court disagreed with this finding, and held that the evidence did not show that the burning was done with the unanimous consent of the councillors and people in "Kgotla."

Their Lordships have examined the evidence, and they are unable to agree with the finding of the Special Court on this part of the case. Their Lordships are of opinion that the evidence justified the conclusion at which the Magistrate arrived. The appeal, therefore, must be decided upon the assumption that the burning of the dwellings of the Ratshosas was ordered by the appellant in his capacity as chief, after consulting and with the approval of the councillors and headmen of the tribe assembled at the "Kgotla."

It may here be stated that the appellant has admitted responsibility for the burning. In fact, he asserts that by the laws and customs of the Bamangwato tribe he was justified in view of what had occurred in burning the Ratshosas' houses and their contents.

Simon and Obeditse were tried upon the charge of attempted murder by Captain Reilly, a Magistrate. They were convicted and sentenced to ten years' imprisonment. The High Commissioner upon appeal reduced the sentence to four years, on the recommendation of the acting Resident Commissioner that the sentence of ten years was excessive in view of the fact that the accused had already been punished by the burning of their property. It appears that John Ratshosa was not prosecuted, inasmuch as he had not taken an active part in the shooting, and he had shared the penalty of having his property burnt.

The view taken by the Magistrate, who tried the suits, of the evidence was that John Ratshosa was the ringleader in the opposition shown by the Ratshosas to the appellant's authority, that there was a preconceived plan by the Ratshosas, that John was the person who incited his brothers to public violence and armed rebellion, and that it was he who handed them the Mauser pistols when the working party was sent to fetch Simon to the work on the roads, and who uttered threats of killing the descendants of Sekgoma.

The Special Court disagreed with this finding, and held that the evidence did not justify the finding that John was the ringleader and was engaged in a plot to kill the appellant.

Their Lordships have examined the evidence relating to this part of the case, and have come to the conclusion that there was ample evidence to justify the finding of the Magistrate who tried the suits, and they see no reason to differ therefrom. This appeal therefore must be decided upon the assumption that John Ratshosa was a party to the plan to kill the appellant, though by accident he was prevented from taking part in the actual attack upon the appellant.

The learned Magistrate, in dealing with the customs of the tribe, over which the appellant is the chief, said as follows: "It is well known to every old Mongwato here present in Court, and the evidence adduced on native law and custom bears this out, that prior to the establishment of a British Protectorate over this territory, plaintiff and his brother Obeditse would most certainly have been condemned to death by the chief and people in 'Kgotla' and executed for their attempted murder and wounding of the chief. Also the plaintiff's and his brothers' dwellings with their contents would certainly have been burned. All their cattle would also have been confiscated. The expert evidence of old headmen upon native custom adduced in this case describes the crime of which plaintiff and his brother were found guilty as an act of war on the chief."

The Special Court on appeal came to a contrary conclusion, and held as follows: "We can find no support, however, for the view that the chief has authority to order the destruction of the house and property of an individual member of the tribe as a punishment for some offence committed by him even after a trial in his Court. In this case there was no semblance of a trial. Nor can it be alleged that what took place amounted to a state of war."

Their Lordships are of opinion that the undisputed facts of this case show that Simon and Obeditse took part in an armed rebellion against the appellant and attempted to murder him by shooting, and although John did not take part in the actual shooting, the evidence as to his previous actions goes to establish the conclusion that he was acting in concert with his brothers, even if he was not the ringleader, as the Magistrate found.

Further, the evidence is clear that by custom of the tribe an act of armed rebellion is punishable by death and by the burning of the dwellings and property of those taking part in such rebellion. The custom was that the chief should consult his councillors in "Kgotla" before executing such punishment. In this case the evidence shows that after the shooting had taken place the councillors and headmen were unanimous in approving the orders of the chief to burn the houses of the culprits.

Their Lordships therefore are of opinion that the burning of the houses and huts of the three plaintiffs, and their contents, was in accordance with the custom of the tribe, and that it was carried out after consulting and with the approval of the councillors and headmen of the tribe.

It was suggested in argument that such a custom as that above mentioned might exist with regard to temporary and outlying huts, but that it could not be applicable to houses which were of a permanent structure and in a large place like Serowe. This point, however, does not appear to have been taken at the trial and no such distinction was made in the evidence.

The main question which arises for consideration is whether the Resident Magistrate had jurisdiction to entertain the suits. This depends upon the terms of cl. 8 of the above named proclamation and the findings of fact by the Resident Magistrate, which have been adopted by the Board.

The clause provides that the jurisdiction of the Courts holden by Magistrates under the proclamation shall not extend to any matter in which natives only are concerned unless in the opinion of such Court the exercise of such jurisdiction is necessary for certain purposes named therein.

It was argued on behalf of the appellant that the appellant should not be considered a native within the meaning of the clause, inasmuch as the terms of the proclamation implied that the chief should retain his existing jurisdiction over his native subjects and that a dispute between him and one of his subjects would not be within the meaning of the words "any matter in which natives only are concerned."

Their Lordships are not able to accept this argument. The words in cl. 8—namely, "any matter in which natives only are concerned," are without any qualification or limitation: they are used in contradistinction to the words "persons of European birth or descent" in cl. 9, and their Lordship are clearly of opinion that the suits in question were matters in which natives only were concerned. Prima facie therefore the jurisdiction of the Magistrate did not extend to the suits.

By reason of the terms of cl. 8 of the proclamation, the Magistrate could only exercise jurisdiction in respect of the suits and make a decree in favour of the plaintiffs if, in his opinion, the exercise of such jurisdiction was necessary in the interests of peace or for the prevention or punishment of acts of violence to person or property. In order to form such opinion it would be necessary for him to consider the nature of the claims contained in the suits, and to ascertain the facts which were alleged to give rise to such claims.

In this case the Magistrate, as already stated, upon investigation of the facts, found that the burning of the plaintiffs' houses and their contents was done in the ordinary course of native and tribal administration of justice. He found that the offence of the three Ratshosa brothers was of such a grave nature that according to native customs the appellant might have ordered them to be killed, that their houses and their contents should be burned and their cattle confiscated.

In consequence of the opportune arrival of the Resident Magistrate the lives of the Ratshosas were saved; their cattle were not confiscated, and they suffered only part of the punishment, to which they were liable, by native custom—namely, the burning of their houses and their contents.

The question therefore for the trying Magistrate was whether, in view of the above mentioned facts, it was necessary for him to exercise jurisdiction in the civil suits relating to claims for damages in respect of the burning of the plaintiffs' houses by the orders of the appellant, in the interests of peace, or for the prevention or punishment of acts of violence to person or property. So far as their Lordships can ascertain from his judgment, the Magistrate does not seem to have applied his mind directly to this question, for he did not express any opinion in respect thereof, nor was it specifically dealt with by the Special Court on appeal. It was suggested, however, that the Magistrate must have considered the question, inasmuch as he tried the suits and made decrees therein on the assumption that he had jurisdiction.

In view of the above mentioned findings of fact at which the Magistrate arrived, and which have been adopted by the Board, their Lordships are of opinion that the Magistrate should have held that he had no jurisdiction. It seems to their Lordships impossible to hold that it was necessary in the interest of peace in the future that the Magistrate should entertain claims for damages by the plaintiffs in civil suits against their chief in respect of the punishment which he had inflicted on them in the past in pursuance of native custom for a very serious offence committed against the person of the chief, especially having regard to the fact that such punishment had been taken into account by the High Commissioner and had resulted in the sentences being reduced in the case of two of the plaintiffs and in the non-prosecution of the third plaintiff.

Their Lordships are also of opinion that it was not necessary for the Magistrate to assume jurisdiction in the suits in question for the prevention or punishment of acts of violence to person or property. There was no evidence of the probability of any further breach of the peace or acts of violence being committed by the appellant, and even if there were, civil suits by the plaintiffs against the appellant to recover damages for past acts were not appropriate proceedings for preventing future acts of violence or for administering punishment in respect thereof.

This decision depends upon the facts which are peculiar to this case, and which are quite out of the ordinary, and it is confined solely to the question of jurisdiction under cl. 8 of the proclamation.

Their Lordships desire to make it plain that their decision in this appeal must not be taken as in the least degree approving the action of the appellant in directing the burning of the plaintiffs' houses and their contents, and that if it had been necessary for the disposal of the appeal for their Lordships to express an opinion as to the provisions of cl. 9 of the

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proclamation (which it is not, in view of their decision in respect of cl. 8), they must have held that the custom by reason of which the plaintiffs' houses and their contents were burned was incompatible with peace, order, and good government as expressed in cl. 9.

Their Lordships think it is not out of place for them to suggest that if it is desired to prevent the repetition of such acts, it would seem to be for the High Commissioner to take such steps as he thinks necessary by way of administration.

For these reasons their Lordships are of opinion that the Magistrate was right in deciding that judgment should be entered for the appellant in the said suits, though they are not able to adopt the reasons for that decision.

It follows from the above mentioned conclusion that the Magistrate should not have assumed jurisdiction over the suits, that he should have dismissed the appellant's counterclaim against Simon Ratshosa as well as the claim by Simon against the appellant.

Their Lordships therefore will humbly advise His Majesty that the appeal should be allowed and that that part of the judgment dated September 20, 1929, of the Special Court which set aside and varied the judgments of the Magistrate, dated March 29, 1928, should be set aside, and the judgments of the Magistrate in the suits brought by Simon and John Ratshosa should be restored except in respect of the appellant's counterclaim against Simon Ratshosa, which should be dismissed.

The plaintiff respondents must pay to the appellant his costs of this appeal, and of the proceedings in the Special Court, and of the two suits. There will be no order as to the costs of the appellant's counterclaim against Simon, or as to the costs of His Majesty's Attorney-General.

Solicitors for the appellant: *Gedge, Fiske & Co.*
Solicitor for intervener: *Treasury Solicitor.*

[PRIVY COUNCIL.]

UDUMA LEBBE AHAMATH AND OTHERS . APPELLANTS ;

AND

LEVENA MARIKAR SARIFFA UMMA . RESPONDENT.

J. C.*
1931
July 21.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Mahomedans—Testamentary Power—Will—Proof of Execution—Privy Council Practice—Contention dropped in lower Appellate Court—Wills (Landed Property) Ordinance (No. 21 *of* 1844).

Ordinance 21 of 1844 of Ceylon applies to the will of a Mahomedan, with the effect that every Mahomedan domiciled in Ceylon has full power of disposition of all his property by will, whether in favour of a stranger or of his wife. The Ordinance modified the special laws of August 5, 1806, concerning Mahomedans.

In Ceylon, as in England, the satisfactory evidence of one of the attesting witnesses is sufficient to prove execution of a will.

It is only in very exceptional circumstances that an issue dropped in the intermediate Court of appeal can be revived upon appeal to the Privy Council.

Shariffa Umma v. *Rahamathu Umma* (1911) 14 Ceylon N. L. R. 464 approved.

Judgment of the Supreme Court of Ceylon affirmed.

APPEAL (No. 130 of 1929) from a judgment of the Supreme Court of Ceylon (May 27, 1929) which affirmed an order of the District Court of Colombo (December 17, 1928).

The order of the District Court directed the grant to the respondent of probate of the will of her husband Uduma Lebbe Ibrahim, dated May 24, 1927. The testator was a Mahomedan of the Shafi sect domiciled in Ceylon, and died on April 30, 1928. Probate was opposed upon the ground, among others, that the testator being a Mahomedan his power of disposition by will was limited by the laws and customs governing Mahomedans to one-third of his property, and that Ordinance 21 of 1844 did not apply. That contention was rejected by other Courts in Ceylon, following *Shariffa Umma* v. *Rahamathu Umma.* (1)

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* *Present :* LORD BLANESBURGH, LORD TOMLIN, and LORD RUSSELL OF KILLOWEN.

(1) 14 Ceylon N. L. R. 464.

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The material facts and the provisions of the Ordinance appear from the judgment of the Judicial Committee.

1931. January 15. *Hon. Geoffrey Lawrence K.C.* and *Abdul Majid* for the appellants.

De Gruyther K.C. and *H. I. P. Hallett* for the respondent.

The arguments appear from the judgment. Upon the question whether Ordinance 21 of 1844 applied, and as to its effect, reference was made to *Cassim* v. *Peria Tamby* (1); *Affefudeen* v. *Periatamby* (2); *Shariffa Umma* v. *Rahamathu Umma* (3); *Lebbe* v. *Thameen* (4); *Ummah* v. *Pathumma* (5); and *Abdul Rahiman* v. *Ussan Umma* (6); as to the law and custom governing Mahomedans, to the Ceylon special laws of August 5, 1806, and to Wilson's Anglo-Muhammadan Law, 6th ed., paragraphs 270, 272.

July 21. The judgment of their Lordships was delivered by

LORD BLANESBURGH. By his will, dated May 24, 1927, Ibrahim, a wealthy Mahomedan of the Shafi sect, domiciled in the Island of Ceylon and resident at Colombo, bequeathed the whole of his property to his widow, the respondent, and appointed her his sole executrix. The will purports to have been executed by the testator in the presence of A. M. Fuard, a licensed notary public, and two witnesses, S. C. Paul and James E. Pereira—the notary public and minimum number of witnesses required by s. 3 of the Ceylon Ordinance No. 7 of 1840. Of the attesting witnesses, Dr. S. C. Paul was the medical attendant of the testator. Mr. Pereira was the clerk of the notary, Mr. Fuard.

The testator died at Colombo on April 30, 1928, nearly a year later, and the grant of probate of the will thereafter applied for by the respondent was opposed in the District Court of Colombo by two of the brothers of the deceased, and a sister, who, with her husband, are the present appellants. After prolonged inquiry, probate of the will

(1) (1895) 2 Ceylon N. L. R. 200.
(2) (1911 14 Ceylon N. L. R. 295.
(3) 14 Ceylon N. L. R. 464.
(4) (1912) 16 Ceylon N. L. R. 71.
(5) (1913) 16 Ceylon N. L. R. 378.
(6) (1916) 19 Ceylon N. L. R. 175, 178, 184.

was by order of the District Court, dated December 17, 1928, granted to the respondent and, on appeal, the order was affirmed by a decree of the Supreme Court of the Island, dated May 27, 1929.

The present appeal is from that decree.

In the District Court the grant to the widow was opposed on allegations which led to the following, amongst other, issues being settled for trial: (1.) Was the document produced as being the last will of the deceased executed by him? (2.) Does the document represent the true intention of the deceased in regard to the disposition of his estate, and did he know and approve of the contents thereof? (3.) [As a Mahomedan of the Shafi sect] was it competent to the deceased, in law, to dispose of more than one-third of his estate by his last will? (4.) Was the last will duly executed?

With reference to the issues 1 and 4, the learned judge said that these had not been seriously pressed by the appellants, and that the evidence of Mr. Fuard and Dr. Paul, that the will was duly executed by the deceased, had not been seriously challenged. There was no doubt that these issues, regarding the execution of the will, must be answered in the affirmative. The learned judge, as he indicates, reached that conclusion on the evidence of Mr. Fuard and Dr. Paul, who were called and examined at length before him. Mr. Pereira, the second attesting witness, was not called. But no comment on his absence and no reference to any testimony from him being possibly helpful—indeed, no reference to him at all—is to be found, either in the learned judge's full note of counsel's argument or in his own judgment. Further, his finding on these issues was not challenged in the appellants' petition of appeal to the Supreme Court. Nor is it referred to in the judgment of that Court. There can, their Lordships conclude, be little doubt that by that time these issues as originally raised had been entirely eliminated from the case. In view, however, of the attempt by the appellants to recur to them again—an attempt to which reference must later be made—it is convenient in passing to draw attention to these facts.

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Upon the second issue the learned District Judge, after a careful review of the evidence, found that the will did express the true intention of the testator in regard to the disposition of his estate, and that he knew and approved of its contents. The learned judges of the Supreme Court took on appeal the same view and expressed it in stronger terms. The opposition to the will on this ground was, in their judgment, frivolous and without foundation.

As to the third issue, it was conceded by the appellants before the learned District Judge, that he was bound to answer it in the affirmative, following the decision of the Supreme Court in *Shariffa Umma* v. *Rahamathu Umma.* (1) They reserved to themselves, however, the right to challenge that decision in a higher Court. And they did so challenge it on appeal to the Supreme Court. But that Court adhered.

In these circumstances, it would appear that the question raised by the third issue is alone really open upon the present appeal. The question under the second, by their Lordships' rule—from which in the present case no reason for departure is shown—is disposed of against the appellants by concurrent findings of fact in the Courts below: the first and fourth issues are out of the case, because they were not even raised in the Supreme Court.

But the appellants, while recognizing that the second of the issues might no longer be canvassed, sought with reference to the first and fourth to raise before their Lordships a contention which had not before been heard of in these proceedings—namely, that the absence of Mr. Pereira from the witness-box, without explanation from the respondent of that absence, was fatal to her contentions on these issues, which ought accordingly to be answered in the negative.

Their Lordships as a matter of indulgence, and also that they might be placed in full possession of the facts, permitted some argument to be addressed to them in support of that contention. But they think it necessary in the interests of regularity of procedure to say that, in the circumstances already stated, no such contention was effectively open to the appellants on this appeal.

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(1) 14 Ceylon N. L. R. 464.

It must only be under very exceptional circumstances that an issue dropped in the intermediate Court of appeal, and for that reason not dealt with or referred to by that Court, can be revived before this Board. It can only be under even more exceptional circumstances that an objection, not taken before the trial judge at all—where, if taken, it could at once have been disposed of in a manner satisfactory to all parties—can be raised in the tribunal of final appeal as a fatal objection to a finding of the trial judge, which was not even challenged in the intermediate Court.

But their Lordships, merely as a concession to the appellants, would add that they have considered the point raised, and in their opinion there is nothing in it. Conceding, as they will, that as a result of s. 100 of the Ceylon Evidence Ordinance, 1895, the effect of Mr. Pereira's absence from the witness-box—he being then, as they assume, alive and available—must be determined in accordance with the English law of evidence for the time being: even so, the conclusion must be that the evidence of execution tendered at the trial was by the then existing law of England, if accepted, sufficient for its purpose. To these proceedings in Ceylon the closest analogy in English practice is a contested probate action. In such an action, it was formerly the rule that if a party were put to proof of a will, he must examine the attesting witnesses, and that practice, as prescribed also by the Court of Chancery for the regulation of proceedings at law, is illustrated by *Bootle* v. *Blundell* (1) and *McGregor* v. *Topham*. (2)

But by s. 33 of the Court of Probate Act, 1857, it is enacted that the rules of evidence observed in the Superior Court of Common Law at Westminster shall be applicable to and observed in the trial of all questions of fact in the Court of Probate. The effect of this enactment was, from its date in 1857, to make it unnecessary in a probate suit to call both the attesting witnesses to prove the execution, for in the Courts of law the execution of a will might always be proved by calling one only of them. And that practice the Court of Probate accordingly normally adopted, except in a case where the attesting witness called gives evidence against the due execution—as to which see *Owen* v. *Williams.* (1)

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(1) (1815) 19 Ves. 494b.

(2) (1850) 3 H. L. C. 132.

But all this is by the way. This appeal is concerned with and must be confined to the third issue, which, in terms more apt to the actual problem before the Board, may be phrased thus: Does the Ordinance 21 of 1844 apply to the will of a Mahomedan at all? If it does, is its effect that every Mahomedan domiciled in Ceylon has thereunder full power of disposition of all his property by will (*a*) in favour of a stranger, (*b*) in favour of his wife, and as such one of his "heirs"?

The position of a Cingalese Moslem in the matter of testamentary powers, apart from the Ordinance, may perhaps, for the purposes of the present case, be described with sufficient accuracy as follows: He is precluded from making by will dispositions exceeding one-third of his net assets, remaining after payment of his debts and funeral expenses, to persons other than his lawful heir or heirs, the balance of two-thirds being reserved to be distributed among the lawful heir or heirs according to the rules of inheritance, unless the excess is rendered valid by the consent given after the death of the testator of the heir or heirs whose rights are thereby infringed or by the fact of there being no such heir or heirs. A bequest to an heir or heirs is void by the same law although it may, certainly in the opinion of some authorities, be validated by a corresponding consent. A widow is included amongst the heirs.

The recognition of the Moslem law in these matters is secured to the Moslems of Ceylon by the special laws concerning Maurs or Mahomedans of August 5, 1806, but such recognition is subject always to repeal, alteration or amendment by ordinance enacted from time to time. The whole question, therefore, is whether these special laws have not been modified by the terms of this Ordinance of 1844; and, if they have, whether they have been so far modified as to make the testator's will a valid disposing instrument according to its tenor.

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(1) (1863) 32 L. J. (P. & M.) 159.

Sect. 1 of the Ordinance is preceded by the preamble that "it is expedient that some uniform provision should be made with respect to testamentary dispositions of property," and, so far as now material, is in the terms following: "It shall be lawful for every person competent to make a will to devise, bequeath and dispose of by will all the property within this Colony which at the time of his death shall belong to him or to which he shall be then entitled . . . . and which if not so devised, bequeathed, or disposed of would devolve upon his heirs at law, executor or administrator, to such person or persons not legally incapacitated from taking the same as he shall see fit; and no will . . . . shall be or be liable to be set aside as invalid or inofficious, either wholly or in part, by reason that any person who by any law, usage or custom now or at any time heretofore in force within this Colony, would be entitled to a share or portion of the property of the testator has been excluded from such share or portion or wholly disinherited by or omitted in such will; but every testator shall have full power to make such testamentary disposition as he shall feel disposed, and in the exercise of such right to exclude from the legitimate or other portion any child, parent, relative, or descendant or to disinherit or omit to mention any such person without assigning any reason for such exclusion, disinheritance or omission, any law, usage or custom, now or heretofore in force in this Colony to the contrary notwithstanding."

Now, approaching the consideration of the Ordinance first, apart from authority, their Lordships cannot doubt that it applies to Mahomedan testators as much as to all other domiciled Cingalese. The words of the enactment are of themselves sufficiently comprehensive to include Moslems within their scope. When read in connection with the preamble, which shows that the purpose of the Ordinance is to secure uniformity with respect to testamentary dispositions of property, it is not in their judgment possible to limit or restrict the operation of the Ordinance so as to exclude the wills of Moslem testators from its purview. Their Lordships are struck by the fact that where such limitation is intended to be placed on words of general import with reference to just such a subject as that with which this Ordinance is dealing, it can clearly and easily be done. A provision with such a result will, for example, be found in Ordinance No. 15 of 1876, s. 2.

The Ordinance then being applicable to the will of a Moslem testator, it is clear to their Lordships that it enables the testator to dispose of the whole of his property and not merely one-third part of it. And such has been the declared judicial view in Ceylon since the year 1911, when the decision of the Supreme Court in *Shariffa Umma* v. *Rahamathu Umma* (1) was pronounced.

Their Lordships agree with that decision in the terms in which it was given, but even if they had felt more doubt on the matter than they do, they would have hesitated now to interfere with it after twenty years, especially as they find the learned Chief Justice saying that the Ordinance has always been construed to enable Mahomedans in Ceylon to dispose of the whole of their property by will and that the Mahomedan population in Ceylon had even then freely taken advantage of the privilege. In face of a practice so well authenticated and so long continued, any alteration in the law as so authoritatively laid down must now come from legislation and not from the Courts.

But although the will of the Moslem testator in the case cited was, as is the will here, one in favour of the testator's widow, the actual decision was given without reference to a point which seems to have been taken for the first time in the present case. The appellants here say that, even if on the true construction of the Ordinance a Moslem testator may be empowered by his will to dispose of all his property, he is only so empowered to dispose of it in favour of a "person not legally incapacitated from taking the same," and that a testator's widow, as being one of his heirs, is by Mahomedan law so incapacitated.

To that argument there are, as it seems to their Lordships, at least three answers.

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(1) 14 Ceylon N. L. R. 464.

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The first is that this is a statute of general application, and their Lordships are in agreement with the Supreme Court in the view expressed by them that the words " legally incapacitated "—the word " legally " is of striking significance in this context—apply to persons who are prohibited by legislative enactment or by the ordinary law from taking under a will, such as attesting witnesses (s. 10, Ord. 7 of 1840), or those who, on grounds of public policy, are incapable of taking under a will, as, for example, one who has murdered the testator. But, secondly, the Ordinance expressly enacts that " every testator shall have full power to make such testamentary disposition as he shall feel disposed," and it is not permissible to rank as a person " legally incapacitated from taking " one whose incapacity only arose as incident to a limitation on the power of testamentary disposition, which it is the object and purpose of the Ordinance to abolish.

Again that a person is not so incapacitated by reason of the fact that he or she is one of the heirs of the testator is further shown, as their Lordships think, by the fact that under the Ordinance a will is not to be invalidated by reason of such person " being disinherited by or being omitted in such will," on the contrary the testator in the exercise of his full power of disposition may exclude or " omit to mention " any such person without assigning any reason for such exclusion or omission. These provisions, as it seems to their Lordships, necessarily connote that it is within the testamentary power conferred upon every testator to include and mention amongst those to take under his will any person by whom no objection is to be taken if he be excluded or not mentioned.

On every ground accordingly, their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for appellants: *Francis & Harker.*

Solicitors for respondent: *Freeman & Cooke.*

[PRIVY COUNCIL.]

J. C.*
1931
July 23.

CORPORATION OF THE COUNTY OF LINCOLN . . . . APPELLANTS;

AND

CORPORATION OF THE VILLAGE OF PORT DALHOUSIE . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada (Ontario)—Municipal Corporations—County Highways—Payments by Village to County—Statutory Rebate—Debentures issued by County—Highway Improvement Act (R. S. Ont., 1927, *c.* 54), *s.* 28, *sub-s.* 5.

The respondent village, an urban municipality within the appellant county, was subject by statute to an annual general levy by the council of the county for county road purposes. Under a provision of an Ontario statute of 1926, repealed and re-enacted as s. 28, sub-s. 5, of the Highway Improvement Act (R. S. Ont., 1927, c. 54), the village first became entitled to a rebate in each year of 75 per cent. of the general annual rate raised in the village in the previous year. The annual general rate imposed in the years 1926, 1927 and 1928 included sums required by the council of the county to meet the interest and sinking fund charges upon debentures issued by it before 1926 in order to raise money for constructing and improving roads forming part of the county road system.

Held, that in fixing the sum upon which the respondent village was entitled to the 75 per cent. rebate the appellant county was bound to include the amount raised by it in the village towards the interest and sinking fund charges upon the debentures.

Judgment of the Appellate Division, 66 Ont. L. R. 513, affirmed.

APPEAL (No. 49 of 1931) from a judgment of the Appellate Division of the Supreme Court of Ontario (January 12, 1931) reversing a judgment of Wright J. (June 24, 1930).

The respondents brought an action in the Supreme Court of Ontario against the appellants claiming that under s. 28, sub-s. 5, of the Highway Improvement Act (R. S. Ont., 1927, c. 54) they were entitled, by way of rebate from the general annual rate paid by them, to receive sums in excess of that allowed to them.

**Present:* LORD SANKEY L.C., VISCOUNT DUNEDIN, LORD HANWORTH M.R., LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

The facts and the material statutory provisions appear from the judgment of the Judicial Committee.

The trial judge (Wright J.) dismissed the action. Upon appeal to the Appellate Division the decision was reversed, and a reference was directed to ascertain the amount due. The proceedings are reported respectively at 66 Ont. L. R. 46 and 513.

1931. June 30; July 2. *Lynch-Staunton K.C.* and *Marquis K.C.* for the appellants.

Kingstone K.C. for the respondents.

July 23. The judgment of their Lordships was delivered by

LORD MACMILLAN. The urban municipality of Port Dalhousie, which is a village situated within the county of Lincoln in the province of Ontario and is not separated from the county for municipal purposes, is subject to an annual general levy by the council of the county for county road purposes. Of the amount, however, which in each year is raised by this rate in the village the corporation of the village is entitled to receive back 75 per cent. in the following year from the council of the county by way of remission or rebate, less the cost of certain repairs if incurred by the county. The sums so received back by the village corporation are earmarked in its hands for expenditure on streets in the village. This statutory right to a percentage rebate was for the first time conferred by s. 29, sub-s. 5, of the Highway Improvement Act, 1926 (Statutes of Ontario, 16 Geo. 5, c. 15), since repealed, but re-enacted as s. 28, sub-s. 5, of the Highway Improvement Act now in force, being c. 54 of the Revised Statutes of Ontario, 1927. It appears that before 1926, when this right to a rebate was first conferred, the council of the county had incurred certain capital expenditure in connection with the county road system, and to enable it to meet this expenditure, so far as not covered by grants from the provincial government, had availed itself of its power to issue debentures. These debentures are still current, and the amount of the annual interest and sinking fund charges has been included by the county council in the sum for which it has levied the general annual rate for county road purposes, to which the village of Port Dalhousie is subject in common with the other towns and villages in the county. The question which these proceedings have been brought to determine is whether in fixing the sum on which the village corporation is entitled to its statutory rebate of 75 per cent., the council of the county is bound to include in such sum the amount raised by it in the village towards the interest and sinking fund charges in respect of these pre-1926 debentures.

The proceedings take the form of an action at the instance of the Corporation of the Village of Port Dalhousie against the Corporation of the County of Lincoln, claiming payment of the 75 per cent. rebate on the full amount of the sum raised in the village by the general annual rate for county road purposes in each of the years 1926, 1927 and 1928. Apparently the council of the county in each of the years 1927, 1928 and 1929 paid to the village corporation 75 per cent. of such portion of the sum raised in the village in each of the preceding years by the general annual rate as was applicable to the maintenance of the roads forming the county road system, but declined to pay any rebate in respect of such portion of the sum so raised as represented interest and sinking fund charges on the pre-1926 debentures. It is the justification of this declinature which is in issue.

Wright J., before whom the matter came in the first instance, held in effect that the village corporation was not entitled to any rebate in respect of that portion of the sums raised by the general annual rate which represented charges in respect of debenture debt incurred before the 1926 Act came into force. On appeal the First Divisional Court (Mulock C.J. and Magee, Hodgins, Middleton and Grant JJ.A.) have declared that "the plaintiff is entitled to recover from the defendant seventy-five per cent. of all moneys levied by the said plaintiff since the Highway Improvement Act, 1926, came into force and remitted to the defendant county in respect of annual general rates made by the defendant for county road purposes, whether the defendant applied the amount so raised for constructing and improving the roads in the said county road system or to pay annual debt charges upon debentures issued by the said defendant for such purposes or for maintaining and superintending such roads or for such other expenditures properly chargeable to the said system."

Against this judgment, which decided the question at issue in favour of the village corporation, the council of the county has now appealed to His Majesty in Council. Their Lordships, having heard the matter fully argued, are of opinion that the judgment appealed from is well-founded.

It is important to observe at the outset that the case came before the Courts on certain agreed or admitted facts. For the present purpose the most important of these admitted facts are contained in paras. 2, 3 and 4 of the plaintiff's statement of claim, which read as follows: "2. Under the authority of the Highway Improvement Act and of certain of its own by-laws the defendant prior to the year 1926 established a county road system throughout the county of Lincoln. 3. That, apart from grants obtained from the province of Ontario, the cost of constructing, improving, maintaining and superintending the roads included in the said county road system and other expenditures properly chargeable to the said system are met and raised by the levy of an annual general rate upon all the municipalities, including the village of Port Dalhousie, in the said county of Lincoln. 4. For the purpose of meeting the cost of constructing and improving the roads included in the said system, the defendant, under the authority of the said Act, has from time to time issued its debentures and the annual debt charges for principal and interest upon such debentures are included in and form part of the said annual general rate levied as aforesaid."

These paragraphs are expressly admitted in the statement of defence, and para. 4 in particular is in substance repeated in the agreed statement of facts on record, dated May 20, 1930.

The documents included in the record show the procedure which was adopted. The year 1926 may be taken as an example. On June 15, 1926, the council of the county enacted a by-law, No. 807 (or, in the language of English local government, passed a resolution), to raise the sum of $372,528.94 to carry on the business of the county for the year 1926. This by-law recited (inter alia) that it was necessary and expedient to raise the sum of $94,095.38 in order to pay the interest and sinking fund on debentures authorized to be issued for the construction of roads in the county under the provisions of certain county by-laws. On this recital the council of the county proceeded to enact: "(4.) That for the purposes of paying the interest which shall accrue on the debentures authorized to be raised for the construction of roads in the county under the provisions of [the by-laws mentioned] and of providing for the sinking fund for the payment of the principal of the said debentures at their maturity, there shall be raised, levied and collected by an equal rate of 5 mills on all the rateable property of the county over and above the cost of collection. . . . . (9.) That the several rates imposed by this by-law shall be raised, levied and collected by the councils and officers of the local municipalities severally liable therefor and shall be paid over by the treasurers of the several municipalities to the treasurer of the county of Lincoln."

The schedule of assessments which is appended to and incorporated with the by-law contains an entry against the municipality of a sum of $3081.89 under the head of county roads, being 5 mills on $616,377, the total assessment of the village. This sum of $3081.89, their Lordships understand, represents the plaintiff's proportion of the interest and sinking fund charges on the pre-1926 debentures, and it is in effect 75 per cent. of this sum that the plaintiff claims from the defendant. The sum levied for the maintenance (as distinguished from construction) of the roads in the county system is included in an item of $6533.59 entered against the village under the head of general purposes, and the plaintiff has received repayment of 75 per cent. of the sum so included.

The procedure in the two succeeding years was on similar lines.

Now it is admitted, as their Lordships have observed, that in 1926 the general annual rate levied on Port Dalhousie by the county for road purposes included the rate authorized by para. 4 of the by-law just quoted, and the same thing happened in 1927 and 1928 under corresponding by-laws. The duty of the county in 1927 under s. 29, sub-s. 5, of the Highway Improvement Act of 1926, and in 1928 and 1929 under s. 28, sub-s. 5, of the revised statute of 1927 was on or before April 1 in each of the years 1927, 1928 and 1929 "to remit . . . . in the case of a village 75 per centum of the amount raised by such rate [the general annual rate] in the previous year," less the cost of certain repairs if incurred. This duty to remit 75 per cent. plainly extends to the whole proceeds of the general annual rate. The statutes make no provision for excluding from the calculation any part of the sum raised by the general annual rate, and their Lordships can find no warrant in particular for excluding that part of the proceeds of the general annual rate which represents the contribution of the village to the interest and sinking fund charges on the county's debenture debt.

The learned judge of first instance would himself, as appears from his judgment, have reached the conclusion that the plaintiff was entitled to succeed but for what he describes as "an insuperable obstacle" which he found in sub-s. 6 of s. 28 of the revised statute of 1927 (which re-enacts s. 29, sub-s. 6, of the 1926 Act). The sub-section is as follows: "6. Subject to the provisions of sub-s. 5 the amount so repaid by the county shall be deemed to form part of the expenditure in carrying out a plan of highway improvement in the county for the purpose of ascertaining the amount of aid which may be granted to the county under this Act."

Under s. 17 of the revised statute of 1927, re-enacting previous similar legislation, the Minister of Public Works and Highways of the Province, where an approved plan of highway improvement under the Act is being carried out in a county, is empowered to direct payment to the county of 50 per cent., or such other proportion as may be authorized, of the expenditure of the county council in carrying out such plan, including the payments authorized by the Act to be made by the county to towns and villages, as contained in an annual statement required to be submitted to the Minister. Accordingly, so runs the argument, if the county has already under the last-mentioned provision received from the central authority 50 per cent. of the cost of its scheme of road construction it will in effect be receiving a second grant for the same purpose if it is entitled to include in its annual statement qualifying for a grant from central funds the 75 per cent. of its interest and sinking fund charges on road construction debt which it remits by way of rebate under s. 28, sub-s. 5. Their Lordships do not find in this consideration, assuming it to be well-founded, any justification for introducing a qualification which the legislature has not seen fit to make into the definite language of s. 28, sub-s. 5. They agree with the view taken by Middleton J.A. when he says: "I cannot understand why a right plainly conferred upon the village should be taken from it because the right of the county with respect to a refund from the province is deemed to be unduly in ease of the county. The right of the village is not to be made in this way dependent upon the right of the county."

It was submitted by the appellant that the view of the matter which was taken by the Appellate Division and which also commends itself to their Lordships, offends in some way against the accepted principle that legislation is presumed not to be retrospective. It is true that the rebate principle introduced in 1926 involves indirectly some redistribution of the burden of the original cost of the work of road construction and it was said that as that work was agreed to on a particular basis of distribution of the cost it was inequitable to disturb that basis by subsequent legislation. This argument might appropriately have been addressed to the legislature when the rebate was under consideration, but it is not one which would justify a Court of law in modifying the plain language of a statute, and in any case a redistribution of the burden of public charges, based presumably on considerations which have commended themselves to parliament, can scarcely be regarded as a legislative novelty or anomaly.

It remains to mention a point which is raised in the appellant's printed case and was argued before the Board, but of which there is no trace in the pleadings or in the judgments of the Court below. The point arises in this way. In s. 28, sub-s. 5, of the revised statute the annual general levy for county road purposes to which urban municipalities are made subject is described as the annual general levy "under the by-law mentioned in s. 12." On turning to s. 12, the by-law there mentioned is found to be a by-law adopting a plan of county road improvement and establishing a county road system, and the section goes on to enact that the by-law shall provide for the levying of an annual general rate, the proceeds of which are to be applied to road construction and maintenance. The appellant now states in its case to this Board as the first reason why its appeal should be allowed: "Because the levies to raise the interest and sinking fund to pay the debentures for the construction of the roads in question were not made 'under the by-law mentioned in s. 12,' all such levies were made under the Municipal Act as authorized by s. 14, R. S. Ont., 1927, c. 54."

In view of the agreement of parties as to the facts on which this case is to be decided, which include an admission by the county that the debentures in question were issued under the authority of the Highway Improvement Act, and that the annual debt charges for principal and interest on these debentures have formed part of the annual general rate levied by the county for county road purposes, their Lordships do not consider that the appellant is now entitled to put forward this belated contention, upon which, moreover, their Lordships do not have the advantage of the views of the judges of the Court of Ontario, who are specially familiar with the provincial legislation. So far, however, as their Lordships have been able to examine the matter, the appellant's contention appears to be unfounded. The Highway Improvement Act of 1914 by s. 15 authorizes the county council to pass by-laws (inter alia) to raise by debentures the sums necessary to meet the expenditures under the Act up to a specified limit. " This section," says Meredith C.J., " clearly authorizes the imposition of a rate to meet the debentures " (*Village of Merritton* v. *County of Lincoln* (1)). In point of fact the county by-law No. 600, enacted in 1917 under the Highway Improvement Act of 1914, which by-law authorized the road construction work the expenditure on which is represented in part by the debentures in question, provides as follows: " 5. Funds for the construction, improvement and maintenance of the roads and highways herein designated shall be raised by annual levy based upon the equalized assessments of the municipalities within the county . . . . or by the issue of debentures from time to time or by other means authorized by the Municipal Act, the Highway Improvement Act or other statute of the province of Ontario in that regard, and the rate for the payment of such debentures issued for the aforesaid purposes or any rate levied under authority of or by reason of the said Highway Improvement Act shall be levied and collected upon the rateable property aforesaid. . . . ."

This by-law remains in force, notwithstanding the repeal of the Act of 1914, by virtue of the Ontario Interpretation Act (R. S. Ont., 1927, c. 1), which provides by s. 15 that where any Act is repealed and other provisions are substituted by way of amendment, revision or consolidation all " by-laws made under the repealed Act shall continue good and valid in so far as they are not inconsistent with the substituted Act or enactment until they are annulled and others made in their stead." Sect. 12, sub-s. 7, of the 1927 Act itself contemplates that by-laws theretofore passed for the purpose of establishing a county road system will continue to be operative, for it provides for their amendment so as to bring them into conformity with the newly-enacted provisions.

It is accordingly clear that the levies for the debenture charges in question are made under and in virtue of this still subsisting by-law No. 600, under which the county road

(1) (1917) 41 Ont. L. R. 6, 21.

system was established and the roads constructed under the Highway Improvement Act of 1914, and whereby provision was also made by virtue of that Act for meeting the consequent expenditure. The Municipal Act applies to the debentures only so far as it supplies a code of machinery for the issue and regulation of municipal debentures: see also s. 14 of the Highway Improvement Act of 1927.

The argument really goes to this, that it was incompetent to include the debenture charges in the sum to be raised by the annual general levy under the Act of 1927 (although they were so included in fact), inasmuch as that levy must be under the by-law mentioned in s. 12, and s. 12, it is said, contemplates by-laws to be passed after the enactment of the Act of 1927 and referable to expenditure incurred thereafter. This would apparently lead to the result, as their Lordships understood counsel for the appellant to admit, that the maintenance charges also on the roads constructed before 1926 would have to be excluded from the annual general levy for road purposes, a result which would upset the whole administration of the county road system. The true view would appear to be that, inasmuch as s. 12 of the Act of 1927 contemplates the existence and continuance of county road systems already established, so the annual general levy under the by-law mentioned in s. 12 extends to cover the charges in respect of expenditure already incurred under an existing and still operative by-law establishing a county road system. Their Lordships are satisfied, so far as they are able to judge from the somewhat incomplete analysis of the scheme of this legislation which was presented to them, that the point now sought to be taken by the appellant, even if admissible at this stage, proceeds on a misconception of the effect of the relevant statutes, and they do not pursue the matter further.

Their Lordships do not find it necessary to discuss certain subsidiary points which were raised relating to an agreement between the parties of January 30, 1923, and to the special position of suburban roads. These topics are not adverted to in the judgments in the Appellate Division, and their

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Lordships are content to express their agreement with the manner in which they were disposed of by the judge of first instance.

The result therefore is that their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the respondent's costs of the appeal.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR ONTARIO . APPELLANT;

AND

NATIONAL TRUST COMPANY, LIMITED . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada (Ontario)—Succession Duty—Gift inter vivos—Valuation for Duty—Shares in Ontario Company—Succession Duty Act (R. S. Ont., 1927, *c.* 26), *s.* 4; *s.* 8, *sub-s.* 2 (*b*) (*ii.*).

The Succession Duty Act of Ontario by s. 8 charges to duty all property situate in Ontario passing on the death of any person, and provides that property so passing is to be deemed to include (inter alia) any property taken under a disposition operating as an immediate gift inter vivos made since July 1, 1892. It is provided by s. 4 that the dutiable value of property is to be its fair market value at the date of the death of the deceased.

A resident of Ontario died in 1929, having in 1925 transferred to his wife as a gift shares in a company registered and having its office in Ontario. The value of the shares at the date of the gift was $50,240, and at the date of the death of the deceased $264,183.50. It was not disputed that the shares were dutiable under the Act.

Held, that the duty was payable upon the value at the date of the death of the deceased.

Lord Strathcona v. *Inland Revenue,* 1929 S. C. 800, applied.

Judgment of the Appellate Division, [1931] O. R. 122, reversed.

APPEAL (No. 53 of 1931) from a judgment of the Supreme Court of Ontario, Appellate Division (March 9, 1931), affirming a judgment of Orde J.A. (August 20, 1930).

* *Present:* LORD BLANESBURGH, LORD MERRIVALE, LORD HANWORTH M.R., LORD ATKIN, and LORD MACMILLAN.

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The respondents were the executors and trustees of the will of W. E. Wilder of Toronto, who died on May 28, 1929. On December 30, 1925, the deceased had made a gift to his wife of 500 shares of $100 each in a company registered, and having its head office, in Ontario. The shares had not been transferred by her at the date of the death of the deceased. The value of the shares at the date of the gift was $50,240, and the value at the date of the death of the deceased $264,183.50.

The appellant sued for a declaration that for the purposes of succession duty under the Succession Duty Act of Ontario the shares should be valued at the market value at the date of the death of the deceased. It was not disputed that the shares were property chargeable to duty under the Act, but it was contended that the duty was payable upon the value at the date of the gift.

The material terms of the Act (R. S. Ont., 1927, c. 26) appear from the judgment of the Judicial Committee.

The trial judge, Orde J.A., held that the value of the shares was to be taken at the date of the gift, and that view was affirmed by the Appellate Division—Mulock C.J.O., Hodgins, Middleton, and Grant JJ.A., Magee J.A. dissenting. The judgments are reported at [1931] O. R. 122.

1931. July 13. *E. Bayly K.C.*, *J. T. White K.C.* and *M. Alexander* for the appellant.

Tilley K.C. for the respondents.

July 28. The judgment of their Lordships was delivered by

Lord Hanworth M.R. The point to be decided in this appeal can be stated quite shortly—Is the value of property, the subject of a gift inter vivos, to be taken for the purpose of succession duty as on the date of the gift, or as on the date of the death of the donor?

The facts which give rise to the question are admitted. William Edward Wilder of the City of Toronto, an investment banker, on December 30, 1925, gave to his wife, the second defendant upon the record, as an immediate gift inter vivos, within the meaning of cl. (*b*) (ii.) of s. 8, sub-s. 2, of the Succession Duty Act, R. S. Ont., 1927, c. 26, and amendments, 500 shares in the capital stock of Picton Securities, Ld.

Picton Securities, Ld., is a private company incorporated under the Companies Act (Ontario), with its head office in the said Province. Its shares are not transferable to any person who is not already a shareholder without the previous consent of the directors of the company. None of its shares have ever been sold or offered for sale.

William Edward Wilder died on May 28, 1929, leaving his widow him surviving, and the first defendant as the sole executor and trustee of his will. No change occurred in the ownership of these 500 shares between the date of the gift and the date of the death of the donor. They remained in the possession of his donee, who did not part with the shares, or charge, or in any way deal with them, nor were the shares in any way commuted or altered.

The value of the shares at the date of the gift was $50,240, and the value at the date of W. E. Wilder's death was $264,183.50. Which of these values is to be taken as subject to succession duty ?

The Attorney-General claims a declaration that the true date is May 28, 1929, the date of the death, and the defendants submit that the true date is that of the gift, December 30, 1925. The second declaration asked for in the prayer of the statement of claim was not considered in the Court of first instance or in the Court of Appeal, and before the Board it was by consent expressly struck out.

Orde J.A., who tried the case, decided in favour of the defendants' contention, and made a declaration that the shares were to be valued as at December 30, 1925.

The Appellate Division, by a majority, upheld that decision, and hence the Attorney-General appeals.

The charging section of the Act is :—

" 8.—(1.) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere as well as all other property subject to succession duty upon a succession shall be subject to duty at the rates hereinafter imposed.

"(2.) Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property :—. . . . (*b*)—(i.) Any property taken as a *donatio mortis causa ;* (ii.) Any property taken under a disposition operating or purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, made since the 1st day of July, 1892."

By virtue of the terms of sub-s. 2 (*b*) (ii.) above set out, it would seem that the 500 shares given by the testator on December 30, 1925, are covered by the charge to tax, and must be subject upon the very simple facts of the present case to the appropriate duty imposed.

An argument was addressed to their Lordships upon the true meaning of the word "passing." The difficulty or rather the impracticability was insisted upon, of including within that word, property which it is to "be deemed to include"; that is property notionally passing, when such a notion may be derived from facts which occurred as far back as July 2, 1892, during which lapse of time assignments, charges, deaths, assignments by operation of law in bankruptcy and in winding up, may have obscured or indeed obliterated the original transaction.

But their Lordships are not concerned to consider these problems and difficulties. There is no question raised in the case whether the Act applies to this donation. That is admitted for the purpose of the case and this appeal, though all other rights which the defendants may have are reserved to them. The only submission of the defendants in the case—the respondents in this appeal—is that December 30, 1925, "the date of the gift thereof" is the date at which the value of the shares is to be taken.

Whatever may be obscure in this Act it is not easy to raise a doubt upon this point. Assuming that there is a liability to the duty, s. 4 seems to lay down in simple plain terms the date at which the value is to be determined. Its terms are as follows: "In determining the dutiable value of property or the value of a beneficial interest in property, the fair market value shall be taken as at the date of the death of the deceased." The section proceeds to permit certain deductions to be made from the value thus ascertained; but these provisions introduce no obscurity to the principle on which the value is to be determined. It is to be noted, too, that what is to be determined is the dutiable value of the property—not of the original gift as it was made.

Sect. 4 on this point appears to coincide with s. 8, sub-s. 2, in which property passing on the death is to be deemed to include property passing and taken under a disposition previous to the death. If the date of the disposition were to prevail the terms of sub-s. 2 should have been differently drawn, for at the date of the transfer the property disposed of was the property of the transferor and no such notional inclusion would be called for.

The attention of their Lordships was called to the Scottish case of *Lord Strathcona* v. *Inland Revenue*. (1) In that case the Court had to consider the effect of the provisions of the Imperial Finance Act, 1894, s. 2, sub-s. 1 (*c*), and s. 7, sub-s. 5, which bring into the estate of the deceased, at the value which it would fetch in the open market at the time of the death of the deceased, property which the deceased has within a term of three years anterior to his death made the subject of a gift inter vivos. Lord Sands's observations in his judgment are germane to the point under consideration; he says (2): " The keys to the interpretation of that legislation are the ideas of property passing, and of property being deemed to pass although it does not actually pass. These ideas have been the subject of much judicial exposition and are now familiar, so I do not dwell upon them. It is enough that property which is deemed to pass upon death is upon the same footing as regards liability for estate duty as property which actually passes. One of the classes of property which are deemed to pass on death and so become subject to estate duty is property which is the subject of donation before death as described in the 1881 Act . . . .

(1) 1929, S. C. 800. (2) 1929, S. C. 807.

for estate duty purposes the property donated is to be treated just as if it had remained the property of the deceased until his death and had then passed as part of his estate."

Their Lordships are not unmindful of the problems and anomalies to which the statute may give rise. These persuaded Orde J.A. to reject the interpretation adopted in this opinion in order to mould the scheme of the Act on to what he thought would be more symmetrical and satisfactory lines.

In the Appellate Division a number of illustrations are suggested which it is claimed are such that the interpretation contended for by the appellant cannot have been intended by the legislature. But it must be remembered that it would not be difficult to suggest analogous illustrations from an opposite point of view. To take one only—suppose on the facts of the present case that the value of the property at the time of the gift had been $260,000, and that had dwindled down to $10,000 at the time of the death, there would have been a hardship upon the donee, who would then have been compelled to pay duty as upon a value 26 times that to which the property had diminished at the time of the death. The tax would have been payable, but the gift would provide no sufficient resources from which to pay it. Such illustrations are to be found pro and con in any statute which touches so many of the manifold and complex aspects of human life and endeavour, as a taxing Act does. A solution to some of them is to be found, as pointed out by Lord Sands in the case above cited, by directing attention to the terms of the statute which imposed, in that case, as well as in the present, the duty not upon the value of the gift, but upon the value of the property which is brought into charge.

While the Board fully recognize the difficulties and inequalities that may arise under a statute which looks back over a span of more than a full generation of years, their Lordships find themselves required to construe the words of the sections in relation to the simple facts of this case. A citizen of Toronto gave to his wife shares in a company

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incorporated under the Ontario Companies Act, which has its head office in the Province. His wife retained those shares in her own hands, and held them at the time of his death, when his estate became subject to the Ontario Succession Duty Act. Upon those facts s. 4 appears unequivocal. The dutiable value of property shall be determined and "taken as at the date of the death of the deceased."

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the judgments of the Courts below set aside, and that a declaration should be made in the action as asked in (*a*) of the prayer of the statement of claim. The respondents will be ordered to pay the costs of this appeal, and of all the proceedings in the Courts below.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

END OF VOL. AND OF APPELLATE SERIES FOR 1931.

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Applied. Louis Dreyfus & Co. v. Tempus Shipping Co. **H. L. (E.) 726**

—— *Celtic, The* [1930] P. 197.
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—— *Codling* v. *John Mowlem & Co.* [1914] 2 K. B. 61, 69.
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Disapproved. Kinneil Cannel and Coking Coal Co. v. Sneddon or Waddell - - **H. L. (Sc.) 575**

—— *Considine* v. *McInerney* [1916] 2 A. C. 162.
Referred to. Nixon v. Att.-Gen. **H. L. (E.) 184**

—— *Cooper* v. *The Queen* (1880) 14 Ch. D. 311.
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—— *Cooper* v. *Swadling* [1930] 1 K. B. 403.
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—— *Croxteth Hall, The* [1930] P. 197.
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—— *Dominion Press* v. *Minister of Customs and Excise* [1928] A. C. 340.
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—— *Dudley Revenue Officer* v. *Lloyds British Testing Co.* [1931] 1 K. B. 404.
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—— *Dykes* v. *William Baird & Co.* 1929 S. C. 555.
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—— *Egan* v. *Att.-Gen.* [1930] 1 Ch. 238.
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—— *Ereaut* v. *Girls' Public Day School Trust, Ld.* [1929] 2 K. B. 274.
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—— *Great Eastern Ry. Co.* v. *Haughley Overseers* (1866) L. R. 1 Q. B. 666, 679.
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—— *Greenshields, Cowie & Co.* v. *Stephens & Sons* [1908] A. C. 431, 436.
Dictum of Lord Halsbury in, explained. Louis Dreyfus & Co. v. Tempus Shipping Co. **H. L. (E.) 726**

—— *Gussage All Saints and Gussage St. Michael, Dorset, Parishes of, In re* (1925) 69 Sol. J. 493.
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—— *Hargreaves* v. *Haughhead Coal Co.* [1912] A. C. 319.
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—— *Hawke, The* [1913] P. 223, 226.
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—— *Hines, R. O.* v. *Eastern Counties Farmers' Co-operative Association* [1931] 1 K. B. 446.
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—— *Ingram & Royle, Ld.* v. *Services Maritimes du Tréport, Ld.* [1914] 1 K. B. 541.
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——*Inland Revenue* v. *W. & T. Avery, Ld.*, 1930 S. C. 490.
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—— *Inland Revenue* v. *Currie & Co.* 1930 S. C. 513.
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—— *Inland Revenue* v. *Dewar* 1930 S. C. 787.
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—— *Inland Revenue* v. *Donaldson & Co.* 1930 S. C. 348.
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—— *Inland Revenue Commissioners* v. *Drysdale's Trustees* (1928) 13 Tax Cas. 565.
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—— *Inland Revenue* v. *Forth Conservancy Board* 1930 S. C. 787.
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—— *Inland Revenue* v. *Gunn, Collie & Topping* 1930 S.C. 389, 401. Dissentient judgment of Lord Hunter in, approved. Finn *v.* Kerslake
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—— *Inland Revenue* v. *M'Intyre & Co.* 1930 S. C. 465.
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Applied. Paleokas or Pollock *v.* Mount Vernon Colliery Co.
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—— *Lala Beni Ram* v. *Kundun Lall* (1899) L. R. 26 I. A. 58.
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—— *Leonard* v. *Redbrook Tinplate Co.* [1930] 1 K. B. 643.
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Applied. Commissioner of Taxes *v.* British Australian Wool Realization Association
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—— *Lupton, In re* [1912] 1 K. B. 107, 115.
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—— *Lyon* v. *Taylor* (1929) 21 B. W. C. C. 415.
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—— *Mackinnon* v. *Miller* 1909 S. C. 373.
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—— *Marshall* v. *S.S. Wild Rose* [1910] A. C. 486.
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—— *Mersey Docks and Harbour Board* v. *Lucas* (1883) 8 App. Cas. 891.
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—— *Moore* v. *Naval Colliery Co.* [1912] 1 K. B. 28.
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—— *Rex* v. *Minister of Health. Ex parte Davis* [1929] 1 K. B. 619.
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—— *Scott* v. *Summerlee Iron Co.* 1929 S.C. 830.
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—— *Sedgwick, R. O.* v. *Watney, Combe, Reid & Co.* [1931] 1 K. B. 396.
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—— *Severn Fishery Board* v. *O'May* [1919] 2 K. B. 484.
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—— *Smith* v. *Fife Coal Co.* [1914] A. C. 723.
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—— *Waddell* v. *Kinneil Cannel and Coking Coal Co.* 1930 S. C. 796.
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